89-1761

NO. _____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TROY D. BARNETT, ET AL.

*Petitioners,*

v.

PETRO-TEX CHEMICAL CORPORATION
and TENNECO, INC.,

*Respondents.*

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Whether under Rule 3(c) of the Federal Rules of Appellate Procedure and this Court's decisions in *Foman v. Davis*, 371 U.S. 178 (1962) and *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), a circuit court may look to more than one timely filed document for the purpose of determining whether the requirements of a notice of appeal have been met.

## PARTIES TO THE PROCEEDING

*Troy D. Barnett and the Remaining " Barnett Plantiffs," Petitioners Herein*: Harold D. Bordeau, S. Thomas Borski, Lisa S. Brunn, Robert L. Buckholt, Timothy J. Burke, Larry G. Carlson, Dennis A. Chalupa, Peggy J. Cheeseman, Bobby F. Clark, James W. Colbert, Lonnie C. Dews, Terry D. Funkhouser, Wayne A. I. Hahne, Elizabeth H. Gonzalez, Philip M. Gonzalez, James C. Hirt, William F. Howard, Lester J. Huddleston, Audrey K. Jarman, Wayne K. Kitchel, Elmer R. Lewis, James E. Locke, Hulon C. Lummus, Cecil G. McFarland, Claude E. Manning, Harold E. Manning, Walter V. Marvin, Tommy L. Moser, Carl A. Munson, Jr., James A. Nelson, John J. Nesser, Charles M. Neumann, John R. Oxley, Stephen L. Patrick, John G. Pitre, Paul L. Portis, James T. Rivers, John W. Robinson, Duryl D. Rohne, Connie L. Shultz, Walter L. Shipley, Donald M. Sollock, Hershell S. Terry, John H. Warren, Jerry G. Watson, Donald W. Weidig

*The "Broughton Plaintiffs:"* R. H. Broughton, J. V. Dickson, T. J. Grimsrud, Hal Hay, S. J. Hradecky, W. G. Johnson, F. W. Lueckemeyer, J. V. Musil, L. F. Somer, R. W. Somers, C. A. Zeringue

*Respondents*: Petro-Tex Chemical Corporation and Tenneco, Inc.

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## REFERENCE TO OPINION BELOW

The opinion of the court of appeals is reported as Troy D. Barnett, et al., Plaintiffs-Appellants v. Petro-Tex Chemical Corporation, et al., Defendants-Appellees; Robert H. Broughton, et al., Plaintiffs-Appellants v. Petro-Tex Chemical Corporation, et al., Defendants-Appellees, No. 89-2156 (5th Cir. 1990), and is reproduced in Appendix A of this Petition.

The pertinent orders of the district court are reproduced in Appendices C and D of this Petition.

## GROUNDS FOR JURISDICTION

The judgment appealed from was rendered by the Fifth Circuit Court of Appeals on February 8, 1990. A petition for rehearing was denied by order dated March 3, 1990. The jurisdiction of this Court to review the judgment by writ of certiorari is contained in 28 U.S.C. Section 1254(1).

## RULE INVOLVED

This case involves Rule 3(c) of the Federal Rules of Appellate Procedure, which provides:

Rule 3. Appeal as of Right — How Taken

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

## STATEMENT OF THE CASE

In 1984, Tenneco, Inc. sold the assets of its wholly-owned subsidiary, Petro-Tex Chemical Corporation, to an unrelated entity, Texas Petrochemicals, Inc. Forty-seven former Petro-Tex employees who were subsequently employed by Texas Petrochemicals, collectively called the "Barnett Plaintiffs," filed suit in Texas state court, against Tenneco and Petro-Tex complaining that Defendants breached their individual written contracts of employment by failing to provide them with contractually agreed upon termination pay. Defendants removed the *Barnett* suit to the United States District Court for the Southern District of Texas. Jurisdiction in the federal court was based on 28 U.S.C. § 1441(b).

Shortly thereafter, eleven former Petro-Tex employees who took early retirement when the business was sold, the "Broughton Plaintiffs," also brought suit in federal court claiming that Defendants breached their employment contracts and denied them severance benefits in violation of ERISA. The *Broughton* suit was then consolidated with the earlier filed *Barnett* suit.

The district court granted summary judgment in favor of the Defendants on all claims and entered judgment dismissing the consolidated action on December 30, 1988. On January 9, 1989, the Broughton Plaintiffs filed a motion for reconsideration. On January 25, the Barnett Plaintiffs filed a notice of appeal. On that same day the district court signed an order denying the Broughton Plaintiffs' motion for reconsideration, but the order denying the motion was not entered until January 30, 1989.

On February 24, 1989, the Broughton Plaintiffs filed a second notice of appeal that stated "Robert H. Broughton, et al., Plaintiffs above-named" were appealing the district court judgment. The "Plaintiffs above-named" were listed as "Troy

D. Barnett, et al." (See Appendix E). Three days later, and within thirty days after entry of the order denying the motion for reconsideration, the Barnett Plaintiffs filed their "Form for Appearance of Counsel" with the Fifth Circuit that designated as appellants "Troy Barnett, et al. — see attached list," and included a typed list containing the name of each of the individual Barnett plaintiffs. (See Appendix F).

On February 8, 1990, the Fifth Circuit entered judgment reversing and remanding the district court's grant of summary judgment in favor of Defendants. The court held that the first notice of appeal filed by the Barnett Plaintiffs was not timely; however, the court ruled that because the cases were consolidated at the district court level and disposed of by one final judgment, the second notice of appeal could be used by both groups of Plaintiffs. The court concluded, however, that the notice of appeal was only sufficient to invoke jurisdiction over Troy D. Barnett and Robert H. Broughton, the two individuals actually named in the notice of appeal. The court held that the phrase, "et al." following the first named Plaintiff, Troy D. Barnett, and the statement that "Plaintiffs above-named" were bringing the appeal was not effective to notify the court and the Defendants that any of the other Barnett Plaintiffs were also appealing the judgment. Additionally, the court ruled that the Barnett Plaintiffs' form for appearance of counsel, standing alone, could not satisfy the notice requirements of Rule 3(c). The court declined to consider the notice of appeal and the form for appearance of counsel *together* in determining whether Rule 3(c) had been satisfied. Thus, even though the term "Troy D. Barnett, et al." had been specifically defined in a contemporaneous filing, the Fifth

Circuit summarily dismissed the appeal of 46 of the 47 original Barnett Plaintiffs, Petitioners herein.[1]

## REASONS FOR GRANTING THE WRIT

Review on writ of certiorari should be granted because there is continuing confusion among the circuit courts regarding the parameters of Rule 3(c), Fed. R. App. P. This case presents the clearest example to date of the unrealistically rigid interpretation employed by some circuits, an interpretation that is contrary to both the spirit and the letter of Rule 3(c). Elevating form well beyond substance, the Fifth Circuit here concluded, contrary to this Court's decisions in both *Foman v. Davis*, 371 U.S. 178 (1962), and *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988), that the Rule 3(c) notice requirements can only be satisfied by looking to one document, and one document alone. While that view is consistent with the one adopted by the Seventh Circuit in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988), it is in conflict with that expressed by the Second Circuit and the D.C. Circuit in *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989) and *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d (D.C. Cir. 1987). To underscore the confusion in this area, the Fifth Circuit itself has also expressed an inconsistent view. *See Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988). The issue for this Court, then, can be simply phrased: Can a circuit court look to more than one timely filed document (here a form for appearance of counsel along with a notice of appeal) to satisfy the notice requirements of Rule 3(c)?

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1/ The court also dismissed the appeal of 10 of the 11 Broughton Plaintiffs. This petition for writ of certiorari does not address the claims of those parties.

## I. Applicable U.S. Supreme Court Decisions Mandate Consideration of Petitioners' Form For Appearance Of Counsel Along With the Notice of Appeal.

As this Court recognized in *Torres v. Oakland Scavenger Co.*, appellants must give notice of who they are: "The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal." *Torres*, ___ U.S. at ___, 108 S. Ct. at 2409. As the Court also pointed out, though, the requirements of Rule 3(c) are met if "the litigant's action is the functional equivalent of what the rule requires." *Id.* The Advisory Committee's Note to Rule 3(c) likewise cautions that "[i]t is important that the right of appeal not be lost by mistakes of mere form."

For Petitioners, the only purported failing of the notice of appeal is that it does not, on its face, give notice as to who is included in the "et al." of "Troy D. Barnett, et al."[2] There can be no question, though, that such notice was specifically furnished in Petitioners' timely filed form for appearance of counsel. A careful reading of Rule 3(c) reveals no requirement that the necessary information regarding an appeal be contained in one single document. There is nothing to indicate that a court cannot look to other timely filed documents to fill in the gaps or clarify ambiguous terms.

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2/ Petitioners are, of course, mindful of this Court's holding in *Torres* regarding the lack of meaning to be found in the use of the term "et al.", in and of itself. By way of background, however, it is relevant to point out that, unlike *Torres*, the Barnett Plaintiffs had been specifically and consistently identified in that manner throughout the history of this litigation by all parties and the district court, which entered judgment against "Troy D. Barnett, et al."

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court reversed a circuit court for "narrowly reading" a notice of appeal and allowed just such a construction, holding that a premature notice of appeal, which appealed the judgment of the district court, when construed together with a timely subsequent notice of appeal, which appealed only the denial of the plaintiff's motion to vacate the judgment, constituted a valid notice of appeal with respect to both the judgment *and* the denial of the motion. In reaching its conclusion that two papers could be combined to identify the judgment appealed from (another one of the notice requirements of Rule 3(c)), the Court reasoned:

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granted the asserted ineffectiveness of the first), the court of appeals should have treated the appeal from the denial of the motion as an effective, although inept, attempt to appeal from the judgment sought to be vacated. *Taking the two notices and appeal papers together*, petitioner's intention to seek review of both the dismissal and the denial of the motion was manifest.

*Id.* at 181 (emphasis added). In this case, when the two appeal papers, the notice of appeal and form for appearance of counsel, are viewed together, Petitioners' intention to appeal the judgment is likewise manifest. There is no reasonable basis for a court to consider an untimely appeal paper, as this Court did in *Foman*, and reject a timely filed appeal paper, as the Fifth Circuit has done in this case.

The principles underlying *Foman* were recently reemphasized by this Court in *Torres v. Oakland Scavenger Co.*, where the Court interpreted Rule 3(c) as expressly permitting the very construction that Petitioners advocate here:

> We do not dispute the important principle for which *Foman* stands — that the requirements of the rules of procedure should be liberally construed and that "mere technicalities should not stand in the way of consideration of a case on its merits. . . . *Thus, if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is a functional equivalent of what the rule requires.*

*Torres*, 108 S. Ct. at 2408-09 (emphasis added).

In this case, arguably, the litigant filed papers "in a fashion that is technically at variance with the letter of a procedural rule" when it relied on the abbreviation "et al." that had been used throughout these proceedings to identify the Barnett Plaintiffs. Notwithstanding any alleged technical misstep, however, the litigant's action in filing a form for appearance of counsel on the heels of the notice of appeal, specifically defining who was included in the term "Troy Barnett et al." surely constitutes "a functional equivalent of what the rule requires." *Id.* at 2409.

In this case, it is important to note that the rule designating the time for bringing the appeal was not implicated. Petitioners were within the 30 day period for noticing an appeal when they filed their form for appearance of counsel. Clearly, that appeal paper fit this Court's definition of "*some designation* that gives fair notice of the specific individual or this entity seeking to appeal." *Id.* If another document cannot be considered; indeed, if it can simply be ignored, then this Court's decision in *Foman* to allow the appeal where two notices (one untimely and one not), taken together, provided the necessary information, is a nullity.

## II. There Is A Conflict Among The Circuits Regarding Whether An Appellate Court May Consider More Than One Document To Satisfy The Requirements Of Rule 3(c).

There is continuing disagreement among the circuits regarding the propriety of considering more than one document as constituting an effective notice of appeal. Following this Court's lead in *Foman*, the Second Circuit and the D.C. Circuit permit such a construction. Other circuits, notably the Seventh Circuit and the Fifth Circuit, have rejected that approach outright.

In the most recent case from the Second Circuit, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 160 (2d Cir. 1989), the notice of appeal named Al-Jundi as the only appellant. The Second Circuit looked to another document, however, the amended complaint listing all the plaintiffs as "representatives of the plaintiff class," and concluded that the other members of the class were, by implication, "otherwise designated, however inartfully in the notice of appeal". *Id.* at 1061, n 1. Likewise, in *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987), the appellants filed a premature notice of appeal, but followed it with a certificate notifying the court that they would not order a transcript of the district court proceedings for use on appeal. The court found that the certificate "strongly implicate[d] the original notice of appeal"and that the "implicit

incorporation" of the notice into the certificate provided grounds for determining that the certificate satisfied Rule 3(c): "the information incorporated enables the new notice to fulfill the requirements imposed by Rule 3(c)." *Id.* at 889, n. 74. [3] Quoting *Foman*, the D.C. Circuit concluded that a contrary decision would "contradict the accepted principle that courts should not pretermit decisions on the merits for purely technical reasons." *Id.* at 890, n. 75.

In contrast to the Second Circuit and D.C. Circuit's willingness to look at other documents, the Seventh Circuit has rejected this approach outright. In *Allen Archery, Inc. v. Precision Shooting Equip.*, 857 F.2d 1176 (7th Cir. 1988), the caption of the notice of appeal listed both defendants, but in the body of the notice itself only one of the defendants was designated as appealing the case. Rejecting the argument that defendants could rely on a supersedeas bond filed the next day which identified both defendants as appealing, the Seventh Circuit held that a collateral document could not be considered in determining whether the notice requirements of Rule 3(c) had been met.[4] In an expansive interpretation of *Torres* that ignores this Court's insistence on a liberal construction of the rules, as well as its holding in *Foman*, the Seventh Circuit

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3/ Under the reasoning in *Nichols*, in fact, one could argue that Petitioners' Form for Appearance of Counsel, bearing the designation of Fifth Circuit Case No. 89-2146, implicitly incorporated the notice of appeal already filed, thereby permitting the form to satisfy all of the Rule 3(c) requirements. The only requirement missing from the face of Petitioners' form was identification of the judgment appealed from, which was obviously provided by the notice of appeal that is the basis of the Case No. 89-2146 designation.

4/ Petitioners do not maintain that if the Seventh Circuit had adopted the position advocated here, and considered the subsequently filed document, the result in *Allen Archery* would have been any different. The fatal flaw in *Allen Archery*, as in *Torres*, was that the appellant was specifically excluded, by limitation, in the body of the notice of appeal. That is not the case here.

announced that "*Torres* requires us to insist on *punctilious, literal, and exact compliance* with the requirement of Rule 3(c) that the notice of appeal (or its functional equivalent, if but only if no notice of appeal is filed) 'shall specify the party or parties taking the appeal.'" *Id.* at 1177 (emphasis added).

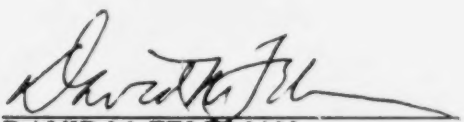
The confusion in this area does not stop with a conflict amongst the circuits. Indeed, the Fifth Circuit itself has held in another case that more than one document can be looked at to satisfy Rule 3(a) requirements. Thus, in *Page v. DeLaune*, 837 F.2d 233, (5th Cir. 1988), the court construed a notice of appeal which was *untimely* filed with a timely filed "Designation of Record on Appeal" as meeting the requirements of Rule 3(c): "We hold that this letter, combined with the 'notice of appeal' . . . satisfies both the letter and the spirit of Rule 3." *Id.* at 237. In the present case, of course, the Fifth Circuit reached an opposite conclusion, refusing to consider Petitioners' form for appearance of counsel along with the notice of appeal. In reaching its holding, the Fifth Circuit relied on its prior decision in *Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car Systems*, 719 F.2d 806 (5th Cir. 1983), where the court declined to construe a form for appearance of counsel, *standing alone*, as a valid notice of appeal. *Id.* at 808. In contrast to *Van Wyk*, here there was an *independent* notice of appeal. The form for appearance of counsel merely supplemented one of its terms. Petitioners do not claim that a form for appearance of counsel alone should suffice as a notice of appeal. However, when the notice of appeal is coupled with Petitioners' form for appearance of counsel, and the reference to "Troy D. Barnett, et al." thus specifically defined, the requirements of Rule 3(c) must be deemed satisfied.

## CONCLUSION

Admittedly, harsh results sometimes flow from non-adherence to the rules of procedure, yet this is allowed in the name of predictability of the law. Although harshness may sometimes be inescapable, no one would suggest that it serve as a guiding principle. When different courts interpret the rules differently, some demanding strict compliance and others applying a liberal construction to permit the "functional equivalent of what the rules require," the result is unpredictability in the law that defeats the purpose of the rules.

There is nothing in this Court's decision in *Torres* to signal that the Court is turning its back on a liberal construction of Rule 3(c) in favor of an inflexible and unreasonable demand for strict compliance. To suggest that, if an ambiguity exists in the notice of appeal, a court must ignore any other timely filed document that dispels that ambiguity flies in the face of reason. It is only through a strained interpretation of the rule and this Court's decisions that such an approach is possible. Petitioners respectfully request this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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# APPENDIX A

**Troy D, Barnett, et al.,**
**Plaintiff—Appellants,**

**v.**

**PETRO-TEX CHEMICAL CORPORATION, et al.,**
**Defendants—Appellees.**

**Robert H. Broughton, et al.,**
**Plaintiff—Appellants,**

**v.**

**PETRO-TEX CHEMICAL CORPORATION, et al.,**
**Defendants—Appellees.**
**No. 89-2146**

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1990

Former employees, some of whom had been hired by purchaser of employer and some of whom had elected for early retirement, brought actions under ERISA and action for breach of contract. Following removal of the claim of the employees who had accepted employment and had filed action in state court, that action was consolidated with the federal action of the employees who had accepted early retirement. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., granted employer's motion for summary judgment, and employees appealed. The Court of Appeals, Lively, Circuit Judge, sitting by designation, held that: (1) notices of appeal were effective only as to plaintiffs named therein and (2) fact that employees had been offered immediate employment by

purchaser of their employer did not mean that they had not been discharged within meaning of employment contract requiring that they be given 90 days notice.

Reversed and remanded.

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Appeals from the United States District Court for the Southern District of Texas.

LIVELY, * JOLLY and DUHE, Circuit Judges.

LIVELY, Circuit Judge.

This is an appeal from summary judgment for the defendants in a consolidated action seeking damages for claimed violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (1982) (ERISA) and pendent state law claims.

I.

A.

In 1984, Tenneco, Inc. sold the assets of its wholly-owned subsidiary, Petro-Tex Chemical Corp., to an unrelated entity, Texas Petrochemicals, Inc. Some Petro-Tex employees accepted immediate employment with Texas Petrochemicals while others exercised an available option and took early retirement around the time of the sale. Members of both groups eventually filed suits against Petro-Tex and Tenneco, claiming breach of contract and ERISA violations.

*Circuit Judge of the Sixth Circuit, sitting by designation

Forty-seven former Petro-Tex employees who accepted employment with Texas Petrochemicals (Barnett plaintiffs) filed a complaint in a Texas district court. They charged that the sale resulted in their involuntary termination and that none of them received the notice of termination required by their employment contracts. Although these plaintiffs accepted employment with Texas Petrochemicals, they complained that they were not given the same jobs or salaries that they had with Petro-Tex. In addition, the Texas Petrochemicals benefit package was worth less than the one they had at Petro-Tex.

Eleven of the employees who accepted early retirement (Broughton plaintiffs) filed a complaint in the United States District Court for the Southern District of Texas. They claimed that Petro-Tex and Tenneco denied them severance benefits in violation of an employer's duties under ERISA, and breached their contract of employment.

The defendants removed the Barnett plaintiffs' case to the United States District Court for the Southern District of Texas where it was consolidated with the Broughton plaintiffs' case on motion of the defendants and over the objections of the plaintiffs. The district court denied the Barnett plaintiffs' motion to remand their action to the state court. Pursuant to a local rule the consolidated action proceeded as "Troy D. Barnett, et al. v. Petro-Tex Chemical Corp., et al." Counsel for each group of plaintiffs continued to press that group's claims separately.

**B.**

The district court granted summary judgment in favor of the defendants on all claims. The final judgment dismissing the consolidated action was signed by the district judge on December 27, 1988, and entered by the clerk on December 30,

1988. On January 9, 1989, the Broughton plaintiffs filed a motion for reconsideration. On January 25, 1989, the Barnett plaintiffs filed a notice of appeal as follows:

> Troy D. Barnett, Et Al., Plaintiffs,
>
> v.
>
> Petro-Tex Chemicals Corp. & Tenneco, Inc., Defendants
>
> NOTICE OF APPEAL
>
> Notice is hereby given that Troy D. Barnett, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30, 1988....

This notice was signed by an attorney who had represented the Barnett plaintiffs throughout the district court proceedings.

On January 25, 1989, the district judge signed an order denying the Broughton plaintiffs' motion for reconsideration. This order was entered January 30, 1989. On February 24, 1989, the Broughton plaintiffs filed a notice of appeal as follows:

> Troy D. Barnett, et al., Plaintiffs,
>
> v.
>
> Petro-Tex Chemicals Corp. and Tenneco, Inc. Defendants
>
> NOTICE OF APPEAL
>
> Notice is hereby given that Robert H. Broughton, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30,

> 1988 and from the Order denying Plaintiffs' Motion for Reconsideration entered in this action on January 30, 1989.

This notice was signed by the attorney who had represented the Broughton plaintiffs throughout the district court proceedings.

C.

The defendants filed a motion to dismiss the Barnett plaintiffs' appeal as untimely and the Broughton plaintiffs' appeal as to all plaintiffs except Robert H. Broughton. The motion was referred to a hearing panel. The defendants argue that the Barnett plaintiffs' notice of appeal was premature, since the Broughton plaintiffs' motion for reconsideration was pending at the time this notice of appeal was filed. The Barnett plaintiffs did not file a new notice of appeal within 30 days after the entry of the order disposing of the motion for reconsideration. While conceding that the notice of appeal filed by the attorney for the Broughton plaintiffs was timely, the defendants contend that the notice was effective only to appeal the judgment against Robert H. Broughton, the only appellant named in the notice.

The Barnett plaintiffs respond that they filed a "Form of Appearance of Counsel" on February 27, 1989, which listed the name of each Barnett plaintiff seeking to appeal the final judgment. They argue that this document, filed within 30 days after entry of the order denying the Broughton plaintiffs' motion for reconsideration, advised the court that all the Barnett plaintiffs were appealing. They argue, further, that since the district court entered only one final judgment in the consolidated cases, only one notice of appeal was required. The Broughton plaintiffs' timely appeal stated that the "Plaintiffs above-named" appealed, and the caption showed Troy D. Barnett, et al. as plaintiffs. Thus, they contend that the

Broughton plaintiffs' notice, when combined with their own Form for Appearance of Counsel, was effective to appeal the final judgment on behalf of all the Barnett plaintiffs.

In the alternative, the Barnett plaintiffs maintain that the Broughton plaintiffs' motion for reconsideration did not affect the time for a notice of appeal by the Barnett plaintiffs. Therefore, they argue, their January 25, 1989, notice of appeal was not premature and they were not required to file a new notice of appeal.

The Broughton plaintiffs argue that their notice of appeal should be amended to add the names of all the Broughton plaintiffs as appellants. They argue, in the alternative, that the case should be remanded to the district court for clarification of the final judgment. They contend that the judgment is ambiguous since the district court merely wrote that "[t]he plaintiffs take nothing" without designating to which of the 58 plaintiffs the judgment applied.

All issues related to the notice of appeal have been fully briefed by the parties.

## II.

The defendants' motion to dismiss raises questions under two different rules of appellate procedure. Federal Rule of Appellate Procedure 3(c) states, "The notice of appeal shall specify the party or parties taking the appeal...." Rule 4(a)(4) provides that if a timely motion is filed in the district court by any party under Rule 59 of the Federal Rules of Civil Procedure to alter or amend a judgment, the time for all parties to appeal runs from entry of the order granting or denying the motion. The Rule continues: "A notice of appeal filed before the disposition of [the motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

## A.

[1] We examine the Barnett plaintiffs' notice of appeal first. The motion for reconsideration is treated as a civil procedure Rule 59(e) motion to alter or amend the judgment, thus bringing appellate Rule 4(a)(4) into play. *Benson v. Bearb*, 807 F.2d 1228 (5th Cir.1987). That rule provides that a motion filed "by any party" causes the time for appeal "for all parties" to run from entry of the order, and renders a notice of appeal filed before disposition of the motion of "no effect." Thus, the pendency of the Broughton plaintiffs' motion rendered the Barnett plaintiffs' January 25, 1989, notice of appeal a nullity.

[2] The Barnett plaintiffs' argument that the Form for Appearance of Counsel, which listed all the plaintiffs represented by the filing attorney, should be treated as a timely notice of appeal cannot be sustained. In *Van Wyk El Paso Investment, Inc. v. Dollar Rent-A-Car-Systems*, 719 F.2d 806 (5th Cir.1983), this court rejected the same argument now made by the Barnett plaintiffs. In *Van Wyk*, Rule 4(a)(4) rendered a premature notice of appeal ineffective, and the would-be appellant relied on several documents which it filed within 30 days of entry of final judgment as providing constructive notice of appeal. One of the documents relied upon was a Form for Appearance of Counsel. Refusing to treat the documents relied upon as the equivalent of a notice of appeal, this court characterized such documents as "no more than steps in the perfection of the prematurely noticed appeal." *Id.* at 807. *Briggs v. Procunier*, 764 F.2d 368 (5th Cir.1985), does not hold to the contrary. In *Briggs*, the notice of appeal was ineffective, but the plaintiff "rescued his appeal," by filing a motion to clarify the record. *Id.* at 370. This motion, unlike the documents in *Van Wyk*, contained all of the information required of a notice of appeal by Rule 3(c). *Id.* at 370-71.

*Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988), likewise provides no support for the Barnett plaintiffs' arguments. The Page court held that several documents, considered together, were sufficient to satisfy Rule 3. It noted the limits to its decision, however, and stated specifically that a Form for Appearance of Counsel plus three communications from court clerks would not suffice. *Id.* at 237.

The Broughton plaintiffs' motion for reconsideration controlled the time for filing a notice of appeal by all the parties to the action, including the Barnett plaintiffs. Because the Barnett plaintiffs did not follow their ineffective notice with a new timely notice of appeal, as required by Rule 4(a)(4), this court has no jurisdiction over their attempted appeal. *Grigg v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct 400, 74 L.Ed.2d 225 (1982); *Harcon Barge Co., Inc. v. D. & G. Boat Rentals, Inc.*, 746 F.2d 278, 280-81 (5th Cir. 1984), *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

**B.**

[3,4] The Broughton plaintiffs' notice of appeal contained the caption assigned by the district court to the consolidated case and designated "Robert H. Broughton, et al., Plaintiffs above-named" as the appealing parties. Rule 3(c) requires that the notice of appeal "specify the party or parties taking the appeal...." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), the Court held that the use of "et al." in a notice of appeal "utterly fails to provide" notice to the court and opposing party of the identity of the appellant or appellants. *Id.* 108 S.Ct. at 2409. Thus the statement that Robert H. Broughton, et al., appealed the final judgment brought only the appeal of Broughton himself before the court of appeals. The court lacks jurisdiction over any

intended appeal by the other Broughton plaintiffs. Strict compliance with Rule 3(c) is a jurisdictional requirement. *Id; Smith v. White*, 857 F.2d 1042, 1043 (5th Cir. 1988).

This court has held in a case decided since *Torres* that the specification of one plaintiff, followed by "et al.," was sufficient to effect an appeal by the only other plaintiff in the case. *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir.1989). The court distinguished *Torres* "in the limited context of this two party action." *Id.* at 129. It was clear that "et al." could refer only to the other plaintiff. In the context of a two party action, the use of "et al." does not leave the court "unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Torres*, 108 S.Ct. at 2409. The unnamed plaintiffs' in the present case can find no comfort in *Pope*. The unnamed plaintiffs in Barnett number 46, and in Broughton they number 10.

C.

Barnett also raises the question whether the Broughton plaintiffs' timely notice of appeal brought the individual appeal of Troy D. Barnett before this court. As Barnett asserts, when cases have been consolidated in district court and disposed of by entry of one final judgment, a single notice of appeal may be used by all the appealing parties. That notice of appeal must, however, satisfy the jurisdictional requirements of Rule 3(c) by providing "notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S.Ct. at 2409.

[5] The Broughton plaintiffs' notice of appeal bore the caption, "Troy D. Barnett, et al, Plaintiffs," and stated that "Robert H. Broughton, et al., Plaintiffs above-named" appealed from the final judgment. The only "Plaintiffs above-named"

were Troy D. Barnett, et al. The use of "et al." was not effective to notify the court and the defendants that any unnamed person was appealing. We believe, however, that the caption and the quoted reference to above-named plaintiffs, read together, gave sufficient notice of the identity of the appellants—Robert H. Broughton and Troy D. Barnett.

[6] It is of no consequence that the attorney who filed the Broughton notice of appeal did not represent Barnett and probably did not intend to include him in the appeal. Our decision must turn on whether the notice of appeal complies with Rule 3(c), not on the intent of the drafter of the notice. This is made clear by the opinion in *Torres*. The *Torres* notice of appeal was intended to include Jose Torres as an appellant. The Court found, however, that "[i]t is undisputed that the omission [of Torres' name] in the notice of appeal was due to a clerical error on the part of a secretary employed by petitioner's attorney." 108 S.Ct. at 2407. If a party who intended to appeal may be shut out by a clerical error, surely a party who also intended to appeal must be included when someone files a form referring to "Plaintiffs above-named" and that person is the only party named above.

[7] Our discussion of *Torres* makes clear that the Broughton plaintiffs' notice of appeal is effective to perfect an appeal by Robert H. Broughton only among the Broughton plaintiffs. The addition of "et al." does not confer jurisdiction on this court over attempted appeals by any of his co-plaintiffs in his original suit. The Broughton plaintiffs assert that their notice of appeal should be amended to include all of the names of those plaintiffs. *Torres* does not permit this. The Supreme Court stated, "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." 108 S.Ct. at 2408. Courts of appeal have no power to extend the time for filing a notice of appeal.

[8] The Broughton plaintiffs also argue that this court should remand the case to the district court for clarification of its "ambiguous" judgment. We find no ambiguity in the judgment. The district court adjudged that "[t]he plaintiffs take nothing." The district court consolidated the two cases and directed that they proceed as a "unified case." The reference to "the plaintiffs" clearly included all plaintiffs in both of the original actions.

This court has jurisdiction over the appeals of the individual plaintiffs, Troy D. Barnett and Robert H. Broughton, but has no jurisdiction over attempted appeals by any other plaintiffs in the two actions who were not named in Robert Broughton's timely notice of appeal.

## III.

The principal remaining issue on appeal is whether the district court properly denied summary judgment in favor of the plaintiffs and properly granted the defendants' motion for summary judgment. The district court held that ERISA does not apply, and that the plaintiffs' right to severance pay is controlled by the provisions of their individual contracts of employment. The plaintiffs do not contest the ERISA ruling, and we are concerned with the summary judgment rulings only as they apply to the contract claims.

### A.

We do not find Barnett's contract in the record. A copy of Broughton's contract was filed with his complaint, and the parties have indicated that the operative provisions are the same. Broughton's contract dealt principally with the protection of trade secrets, contained a limited non-competition clause, and required disclosure to the employer of inventions, discoveries and improvements in which the employee was involved. The final paragraph of the agreement stated:

> Parties hereto agree that except by written mutual consent, the employment covered by this Agreement shall not terminate until either party hereto shall have given the other party at least ninety (90) days prior written notice of the intention to terminate said employment; provided, however, Petro-Tex reserves the right to terminate such employment at any time prior to the expiration of said ninety (90) day period by the payment of the entire salary which might be due and payable Employee for and during the said ninety (90) day notice period.

The defendants did not give the required notice prior to the sale of Petro-Tex to Texas Petrochemicals. Both plaintiffs sued for payment of salary in lieu of the prescribed notice, as provided for in the quoted language. The defendants maintain, as they did in the district court, that neither employee was terminated within the meaning of the agreement. They argue that there was no termination because the sale did not interrupt the plaintiffs' employment. Both immediately went to work at the same plant for the new owner. Although the new jobs were not identical, the work and pay were substantially the same. Broughton, however, apparently retired shortly after the sale upon determining that his benefits with Texas Petrochemicals would be less than as a Tenneco early retiree.

The plaintiffs argue that they were terminated when their employment relationship with Petro-Tex was brought to an end by the sale of the employer's assets to Texas Petrochemicals. They contend that it is immaterial that they were hired immediately by Texas Petrochemicals and suffered no period of unemployment. The agreement spoke only of a termination by Petro-Tex, and the right to notice or salary was not contingent upon the decision of the purchaser whether to offer them employment. They also assert that the defendants

stipulated that there was a termination and that the district court ignored the stipulation in ruling on the cross-motions for summary judgment.

Barnett also argues that the district court abused its discretion in consolidating the cases and in denying his motion for a remand to the state court. Broughton likewise contends that the district court abused its discretion in consolidating the cases.

**B.**

The district court filed a memorandum with its summary judgment order. The memorandum disposed of the breach of contract claims as follows:

> The principal issue determining Petro-Tex's breach of contract is whether the sale of Petro-Tex to Texas Petrochemical was a termination of Petro-Tex employees. Termination means to discontinue the employment of a worker, not a mere change in corporate ownership. Upon the sale, Texas Petrochemicals, the new owner, provided immediate jobs to the former employees. Admitting that some of the employees obtained different responsibility and compensation, the former employees' jobs were not terminated by the sale of Petro-Tex.
>
> Contracting for pay in lieu of a notice of termination is intended to help an individual facing an unexpected period of unemployment to ease the financial burdens while looking for a new job. The employees are not entitled to termination pay because the employees were not terminated.
>
> Although the salary is substantially the same, the employees claim that they have lost up to forty percent of their compensation from Petro-Tex, direct and indirect. At some point, a decrease in total compensation would amount to a

constructive termination but not in this case. A forty percent decrease admittedly is significant but it is not substantial enough to require the payment of termination pay.

## IV.

### A.

[9] The plaintiffs contend that the district court erred by not granting them summary judgment on the basis of the defendants' stipulation that they were terminated. An examination of the record discloses no stipulation by the defendants that the plaintiffs were terminated within the meaning of the notice provision of the contract. The defendants consistently took the position that the notice provision was not applicable to former Petro-Tex employees who were offered comparable employment by Texas Petrochemicals. During the deposition of H. R. Bowers, an attorney for the defendants stated, "We will stipulate that the employment relationship with Petro-Tex was terminated." This was nothing more than an agreement to stipulate to an indisputable fact. It was not a stipulation that the plaintiffs were terminated in the legal sense that the contract required for triggering the right to notice or salary in lieu of notice. Thus, the district court properly denied the plaintiffs' motion for summary judgment.

### B.

The district court erred, however, in granting the defendants' motion for summary judgment. A court may grant summary judgment only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The district court held that the provision in the individual agreements for pay in lieu of a notice of termination "is intended to help an individual facing an unexpected period of unemployment to ease the financial burdens while looking for

a new job." Assuming this intention, the district court held that the employees were not terminated within the meaning of the agreements. Nothing in the agreements requires either conclusion. The agreements do not define the words "terminate" and "termination," and contain no statement of the reason for including the termination provision.

Courts that have considered the question are badly split over whether a period of unemployment is required for an employee to be eligible for severance or termination pay.

1.

In *Younger v. Thomas International Corp.*, 275 Ark. 327, 629 S.W.2d 294 (1982), the Supreme Court of Arkansas affirmed a trial court's rejection of a claim for pay in lieu of notice by employees of a plant that was sold. All employees continued to work at the same or similar jobs, earning at least the salary they were receiving prior to the sale. The employees eventually received a benefits package that equalled the one they enjoyed before the sale. In affirming the trial court, the Supreme Court relied heavily on a statement of purpose in the agreement:

> The purpose of termination allowance is to provide financial assistance for a short period of time to allow for readjustment for salaried employees who are terminated through no fault of their own.

*Id.* 629 S.W.2d at 296. There is no such statement of purpose in the individual agreements in the present case. Furthermore, the employer's severance policy in *Younger* stated that termination would not be paid when an employee was offered an equivalent job opportunity. We find no such policy statement in the present record.

The defendants also rely upon *Linz v. Champion International Corp.* 208 Mont. 99, 675 P.2d 979 (1984). They fail to note, however, that the *Linz* court specifically rejected the trial court's reliance on the fact that the plaintiff was offered comparable employment as the basis of denying severance payments. Instead, the court looked to a definition of "terminate" in prior Montana decisions. Applying this definition, it held that Linz was not entitled to benefits. Also as in *Younger*, the decision in *Linz* was reached after a full trial, not on summary judgment.

Applying South Carolina law, the court denied benefits to former employees in *Livernois v. Warner-Lambert Co., Inc.*, 723 F.2d 1148 (4th Cir.1983). The court emphasized that each case dealing with severance benefits upon termination must be considered on its own facts, since "the variation of language spelling out the particular circumstances in which a right to severance pay will arise approach[es] the infinite ...." *Id.* at 1151. The court based its decision primarily on the fact that the plaintiffs' employment with the purchaser was substantially the same in all material respects as before the sale. In reaching its conclusion, the court found it necessary "first ... to discard as inapplicable cases where the nature of employment by the successor company, in terms of salary and other benefits, is markedly different and less favorable, from the employees' point of view, than that in force when the predecessor was the employer...." *Id.* at 1152. In the present case the plaintiffs claimed a forty percent decrease in total compensation, and the district court correctly assumed this claim to be true for purposes of summary judgment. Without further analysis, however, the district court treated this significant decrease as immaterial.

The defendants also seek to uphold the district court's decision by citing federal decisions denying severance benefits to employees hired by a successor. *E.G. Acton v. Tosco Corp.*,

815 F.2d 1161 (8th Cir. 1986); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir.1985), *aff'd without opinion sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Sly v. P. R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir.1983). Although the courts in these and similar cases upheld the denial of severance benefits, they did so in the context of reviewing the decisions of plans subject to ERISA. When these and similar decisions were rendered, such determinations by administrators were conclusive unless found to be arbitrary or capricious. The Supreme Court has held that this is the wrong standard of review—that a denial of ERISA benefits is to be reviewed under a de novo standard unless a plan gives the administrator certain discretionary authority. *Firestone Tire & Rubber Co. v. Bruch*, — U.S. —, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Although the courts that affirmed denial of benefits under the arbitrary or capricious standard indicated, in some cases, that they agreed with the determination that an employee who is offered comparable employment by a purchaser is not entitled to severance benefits, the denials were not subject to an independent legal analysis. Another ERISA case, applying the arbitrary or capricious standard, has upheld a decision awarding severance benefits even though the employees suffered no period of unemployment because the purchaser retained them in their previous jobs. See *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir.1987). We are not persuaded that these ERISA decisions form a basis for affirming summary judgment in this case.

**2.**

In *Gerson v. Diamond Shamrock Corp.*, 710 S.W.2d 368 (Mo.App.1986), the court held that employees who immediately went to work for a purchaser were entitled to severance benefits when the division for which they worked was sold. The original employer's policy provided benefits "[w]here separation from employment is ... because of a permanent layoff due to lack of

work...." The court held that "[s]ale of the division ended their connection with [the] employer; there was no further work for them with [the] employer." *Id.* at 369. The court found nothing in the controlling language that "distinguishes the case where they are offered employment with the new owner from the case where they are not offered such employment." *Id.*

In *Chapin v. Fairchild Camera and Instrument Corp.*, 31 Cal.App.3d 192, 107 Cal.Rptr. 111 (1973), the employer's policy provided for severance pay that was "intended to cover the readjustment period required by the employee to obtain another position." *Id.* 107 Cal.Rptr. at 113. When the division for which the plaintiffs worked was sold, the purchaser offered comparable employment with full seniority rights and substantially equal fringe benefits. The termination allowances provided by the purchaser were not equal to those of the original employer. Shortly after the sale the purchaser began terminating employees. The purchaser paid some of the terminated employees the smaller benefits provided by its policy.

The California Court of Appeals held that the employees were entitled to receive from their original employer the full amount of severance pay provided by its policy. The court concluded that the sale was a layoff due to lack of work within the meaning of the original employer's policy. Having sold the division, the employer had no work to offer the employees of the sold division. The fact that the plaintiffs were employed immediately by the purchaser was immaterial. Citing *Adams v. Jersey Central Power & Light Co.*, 36 N.J.Super. 53, 114 A.2d 776 (1955), the *Chapin* court stated:

> [U]nemployment is not a prerequisite to the right to separation pay which may, and frequently does, exist where there is no interruption whatever in the continuity of employment. Separation pay is not analogous to, nor is it a form of, unemployment compensation. Rather, it

> is a kind of accumulated compensation for past services and a material recognition of their past value.... It concerns the past, not the future, and once it is earned, it becomes payable no matter what may thereafter happen.

107 Cal.Rptr. at 115-16.

We have not attempted to identify or discuss all the cases dealing with the issue of severance benefits where an employer sells the assets of a company or division and the purchaser offers immediate employment to the seller's former employees. We have discussed a sufficient number of decisions to indicate that each case is controlled by the language of a policy or agreement and that it is not universally accepted that a period of unemployment is a prerequisite for entitlement to termination pay.

C.

[10] In a diversity case applying Texas law, this court has defined "termination of employment" when used in a group insurance policy as "the complete severance of the relationship of employer and employee...." *Bliss v. Equitable Life Assurance Society of the United States*, 620 F.2d 65, 69 (5th Cir.1980) (citation omitted). Literally applied, this definition could lead to the conclusion that Barnett and Broughton were terminated. It is not clear, however, that this definition applies in the context of an employment agreement. There are genuine issues of material fact concerning whether the complete severance of employment relationships resulted in termination and whether the reduced benefits offered by Texas Petrochemicals required a finding that the employees were terminated even though they were offered immediate employment by the purchaser.

We find no support in this record for the district court's conclusion that the plaintiffs, as a matter of law, were not terminated within the meaning of their individual agreements. The district court cited no authority for its conclusion and referred to no record basis for its determination of the intent or purpose of the agreements. Unless the terms of a contract are clear, questions of interpretation are questions of fact. *Carpenters Amended & Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763, 766 (5th Cir. 1985). At least two factual issues precluded the entry of summary judgment in favor of the defendants: (1) the intent of the parties in providing for notice and payment of salary in lieu of notice, and (2) the meaning of "terminate" as used in the individual agreements.

V.

An examination of the record convinces us that the district court did not abuse its broad discretion either in consolidating the two cases, which arose out of the same event, or in denying the Barnett plaintiffs' motion for remand.

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

# APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**
**NO. 89-2146**

TROY D. BARNETT, ET AL.,

Plaintiffs-Appellants,

versus

PETRO-TEX CHEMICAL CORPORATION, ET AL.,

Defendants-Appellees.

**********

ROBERT H. BROUGHTON, ET AL.,

Plaintiffs-Appellants,

versus

PETRO-TEX CHEMICAL CORPORATION, ET AL.,

Defendants-Appellees.

**Appeal from the United States District Court for the Southern District of Texas**

**ON PETITION FOR REHEARING**

**(March 3, 1990)**

Before LIVELY*, JOLLY and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-4

*Circuit Judge of the Sixth Circuit, sitting by designation.

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

TROY D. BARNETT, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. H-85-1296

PETRO-TEX CHEMICAL
CORPORATION, et al.,

Defendants.

FINAL JUDGMENT

The plaintiffs take nothing from Petro-Tex Corporation and Tenneco.

Signed on December 27, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

# APPENDIX D

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

TROY D. BARNETT, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. H-85-1296

PETRO-TEX CHEMICAL
CORPORATION, et al.,

Defendants.

ORDER

The Broughton plaintiffs' motion for reconsideration is denied.

Signed on January 25, 1989, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

# APPENDIX E

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

TROY D. BARNETT, et al.,

Plaintiffs,

V. C.A. No. H-85-1296

(Consolidated With

PETRO-TEX CHEMICAL CORPORATION C.A. No. H-85-2461)

and TENNECO, INC.

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Robert H. Broughton, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for

the Fifth Circuit from the Final Judgment entered in this action on

December 30, 1988 and from the Order denying Plaintiffs' Motion for

Reconsideration entered in this action on January 30, 1989.

Respectfully submitted,
BOYAR, NORTON & BLAIR
By: /s/ John A. Irvine
John A. Irvine
I.D. No. 0509
Five Post Oak Park
Fourth Floor
Houston, Texas 77027
(713) 961-5300
ATTORNEYS FOR ROBERT H. BROUGHTON, ET AL.

# APPENDIX F

# FORM FOR APPEARANCE OF COUNSEL

*Only attorneys admitted to the Bar of this Court may sign this form and practice before the Court. All attorneys admitted to the Former Fifth Circuit must qualify for admission to the New Fifth Circuit. An application for admission is incorporated herein. Two persons from the same organization of firm may sign this form*

**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

**NO. 89-2146**

Barnett, et al vs. PETRO-TEX CHEMICAL CORP

(Petitioner or Appellant) (Respondent or Appellee)

The Clerk will enter my/our appearance as Counsel for Appellants Troy Barnett, et al (see attached list)

(Please list names of all parties represented)

who IN THIS COURT is X Petitioner(s) __ Respondent(s) __ Amicus Curiae

__ Appellant(s) __ Appellees __ Intervenor

I certify that I am a member of the Bar of the Fifth Circuit Court of Appeals, or application for admission is being made below:

/s/ David M. Feldman _____

*(signature)* *(signature)*

David M. Feldman _____

(Type or Print Name) (Type or Print Name)

Social Security No. 090-40-8626 Social Security No. _____

STREET Address 3300 First City Tower, 1001 Fannin

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Phone (713) 651-2260

---

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a lead counsel to whom notification is to be sent, with the understanding that if other counsel should be informed he will perform that function. If lead counsel has not signed above, lead counsel must complete his own form for appearance of counsel. The person to be notified in this case is:

Name of Lead Counsel (Type or print) _____

Troy D. Barnett
Harold D. Bordeau
S. Thomas Borski
Lisa S. Brunn
Robert L. Buckholt
Timothy J. Burke
Larry G. Carlson
Dennis A. Chalupa
Peggy J. Cheeseman
Bobby F. Clark
James W. Colbert
Lonnie C. Dews
Terry D. Funkhouser
Wayne A. I. Hahne
Elizabeth H. Gonzalez
Philip M. Gonzalez
James E. Hirt
William F. Howard
Lester J. Huddleston
Audrey K. Jarman
Wayne K. Kitchel
Elmer R. Lewis
James E. Locke
Hulon C. Lummus
Cecil G. McFarland
Claude E. Manning
Harold E. Manning
Walter V. Marvin
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Carl A. Munson, Jr.

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Paul L. Portis

James T. Rivers

John W. Robinson

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Connie L. Schultz

Walter L. Shipley

Donald M. Sollock

Hershell S. Terry

John H. Warren

Jerry G. Watson

Donald W. Weidig

Supreme Court, U.S.
FILED
JUN 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1761

In The

# Supreme Court of the United States

October Term, 1990

TROY D. BARNETT, ET AL.,

*Petitioners,*

v.

PETRO-TEX CHEMICAL CORPORATION and TENNECO, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit held, as Petitioners imply, that it could not look more than one document to provide names of purported appellants omitted from a notice of appeal or whether the Fifth Circuit instead merely held that the other document relied upon by Petitioners was insufficient to substitute for a timely filed notice of appeal.

Whether, as Petitioners assert, the Courts of Appeals are "confused" regarding the parameters of Fed. R. App. P. 3(c) or whether there is a conflict in the Circuits interpreting Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

Whether Fifth Circuit decisions are inconsistent and, if so, whether such an inconsistency would warrant this Court's review of this case.

Whether the Fifth Circuit correctly applied this Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

## PARTIES TO THE PROCEEDING

*Petitioners the Barnett Plaintiffs:*

Troy D. Barnett, Harold D. Bordeau, S. Thomas Borski, Lisa S. Brunn, Robert L. Buckholt, Timothy L. Burke, Larry G. Carlson, Dennis A. Chalupa, Peggy J. Cheeseman, Bobby F. Clark, James W. Colbert, Lonnie C. Dews, Terry D. Funkhouser, Wayne A. I. Hahne, Elizabeth H. Gonzalez, Philip M. Gonzalez, James C. Hirt, William T. Howard, Lester J. Huddleston, Audrey K. Jarman, Wayne K. Kitchel, Elmer R. Lewis, James E. Locke, Hulon C. Lummus, Cecil G. McFarland, Claude E. Manning, Harold E. Manning, Walter v. Marvin, Tommy L. Moser, Carl A. Munson, Jr., James A. Nelson, John J. Nesser, Charles M. Neumann, John R. Oxley, Stephen L. Patrick, John G. Pitre, Paul L. Portis, James T. Rivers, John W. Robinson, Duryl D. Rohne, Connie L. Schultz, Walter L. Shipley, Donald M. Sollock, Hershell S. Terry, John H. Warren, Jerry G. Watson, and Donald W. Weidig

*The Broughton Plaintiffs:*

R.H. Broughton, J.V. Dickson, T.J. Grimsrud, Hal Hay, S.J. Hradecky, W.G. Johnson, F.W.Lueckemeyer, J.V. Musil, L.F. Somer, R.W. Somers, and C.A. Zeringue

*Respondents:*

Petro-Tex Chemical Corporation and Tenneco, Inc.

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## GROUNDS FOR JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 in that this action arose under the Laws of the United States, specifically the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The United States Court of Appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

## RULES INVOLVED

This case involves Rules 3(c) and 4(a)(4) of the Federal Rules of Appellate Procedure, which provide as follows:

> **Rule 3. Appeal as of Right – How Taken**
>
> * * *
>
> **(c) Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.
>
> Rule 4. Appeal as of Right – When Taken
>
> (a) Appeals in Civil Cases.
>
> * * *

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

## STATEMENT OF THE CASE

In 1984, Tenneco, Inc. sold the assets of its wholly-owned subsidiary, Petro-Tex Chemical Corporation, to an unrelated entity, Texas Petrochemicals, Inc. Forty-seven former Petro-Tex employees who were subsequently employed by Texas Petrochemicals, collectively called the "Barnett plaintiffs," filed suit in Texas state court, against Tenneco and Petro-Tex complaining that Tenneco and Petro-Tex breached written employment contracts by failing to provide them with termination pay. Tenneco and Petro-Tex removed the case to the United States District Court for the Southern District of Texas.

Shortly thereafter, eleven other former Petro-Tex employees, the "Broughton plaintiffs," brought suit in federal court against Tenneco and Petro-Tex also claiming

breach of employment contracts and denial of severance benefits under ERISA. The Broughton plaintiffs' suit was consolidated with the Barnett plaintiffs' suit.

On December 30, 1988, the United States District Court for the Southern District of Texas granted summary judgment in favor of defendants-respondents Petro-Tex Chemical Corporation ("Petro-Tex") and Tenneco, Inc. ("Tenneco"). The Final Judgment entered on December 30, 1988, is reproduced as Appendix A.

On January 9, 1989, the Broughton plaintiffs filed a motion for reconsideration. This motion is reproduced as Appendix B.

On January 25, 1989, before the district court had ruled on the Broughton plaintiffs' motion for reconsideration, Petitioners filed a notice of appeal from the district court's December 30 judgment, which named only "Troy D. Barnett, et al." as the appealing party. Petitioners' January 25, 1989, notice of appeal is reproduced as Appendix C.

On January 30, 1989, the district court denied the Broughton plaintiffs' motion for reconsideration. The district court's order denying the Broughton plaintiffs' motion for reconsideration is reproduced as Appendix D. The Barnett plaintiffs never filed a new notice of appeal following the district court's order denying the Broughton plaintiffs' motion for reconsideration.

On February 24, 1989, a notice of appeal was filed by the Broughton plaintiffs which was captioned "Troy D. Barnett, et al." but named only "Robert H. Broughton, et

al." in the text as the appealing party. The Broughton plaintiffs' notice of appeal is reproduced as Appendix E.

On August 14, 1989, Respondents moved the United States Court of Appeals for the Fifth Circuit to dismiss the appeal of all of the Barnett plaintiffs on the ground that they had failed to file a timely notice of appeal after the district court overruled the Broughton plaintiffs' motion for reconsideration. Respondents also moved to dismiss the appeal as to all appellants not specifically named in the Broughton plaintiffs' notice of appeal. After briefing on the jurisdictional issue was complete, on September 5, 1989, the Fifth Circuit entered an order that the motion to dismiss would be carried with the case. This order is reproduced as Appendix F.

Oral argument on both the motion to dismiss and the merits was held on November 8, 1989 before a panel consisting of Fifth Circuit Judges E. Grady Jolly and John M. Duhe, Jr., and Senior Sixth Circuit Judge Pierce Lively. On February 8, 1990, the Fifth Circuit issued its opinion on the merits and on the jurisdictional issue raised by Respondents' motion to dismiss the appeal. The opinion of the Fifth Circuit in *Troy D. Barnett, et al. v. Petro-Tex Chemical Corporation, et al.*, 893 F.2d 800 (5th Cir. 1990), is reproduced as Appendix G.

On the jurisdictional issue, the court held that the Barnett plaintiffs' first notice of appeal was rendered ineffective under Fed. R. App. P. 4(a)(4) by the Broughton plaintiffs' motion for reconsideration. 893 F.2d at 804. Rather than holding that the Barnett plaintiffs had simply failed to file a timely notice of appeal, the Fifth Circuit concluded that the Broughton plaintiffs' timely notice of

appeal conferred appellate jurisdiction over all of the plaintiffs specifically named in the notice. *Id.* at 805. Since Robert H. Broughton was named in the body of the Broughton plaintiffs' notice of appeal and Troy D. Barnett was named in the caption, the Fifth Circuit concluded that the notice of appeal gave sufficient notice of the identity of the plaintiffs specifically named therein to confer appellate jurisdiction over appeals by Mr. Broughton and Mr. Barnett. *Id.*

As the Fifth Circuit's opinion makes clear, Petitioners, the Barnett plaintiffs, made not one error in perfecting their appeal, but two. First, the Barnett plaintiffs failed to file a new notice of appeal following the district court's denial of the Broughton plaintiffs' motion for reconsideration. Had the Barnett plaintiffs at that point filed a proper notice of appeal which named all the plaintiffs seeking to appeal, the Fifth Circuit would have had jurisdiction over the appeal by all of the Barnett plaintiffs. Indeed, it is only by the Fifth Circuit's liberal reading of the Broughton plaintiffs' notice of appeal to include Mr. Barnett that *any* of the Barnett plaintiffs managed to perfect their appeal.

Second, both the Barnett plaintiffs' premature notice of appeal and the Broughton plaintiffs' timely notice of appeal failed to comply with Fed. R. App. P. 3(c), as interpreted by this Court in *Torres*, because both notices of appeal named only one appellant, followed by the *et al.* designation.

On February 21, 1990, the Barnett plaintiffs filed a petition for panel rehearing in the Fifth Circuit. The petition for rehearing was denied by the Fifth Circuit on

March 3, 1990. The order denying rehearing is reproduced as Appendix H.

## REASONS WHY THE PETITION SHOULD BE DENIED

The Barnett plaintiffs' petition for writ of certiorari should be denied. The issue raised in the petition was addressed by this Court less than two years ago in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

Furthermore, there is no "confusion" in the Courts of Appeals regarding this Court's decision in *Torres* and the Circuits do not appear to be divided in their interpretation of *Torres*. Indeed, the Courts of Appeals appear to be consistently following *Torres* and dismissing appeals in cases – such as this one – where only one appellant is named followed by the *"et al."* designation. Indeed, the Fifth Circuit's decision in this case is in accord with the overwhelming majority of decisions from other Courts of Appeals interpreting *Torres*. Furthermore, every Court of Appeals to consider the issue has determined – like the Fifth Circuit did here – that an appearance of counsel form is insufficient to satisfy the requirements of Fed. R. App. P. 3(c). There is no conflict in the Circuits which would warrant this Court's exercise of its power of supervision.

In addition, any alleged internal inconsistency in Fifth Circuit decisions may be corrected by that court sitting *en banc*, and plainly does not warrant this Court's review.

**Finally, this Court's review is unnecessary because it is clear that the Fifth Circuit correctly applied the *Torres* decision to dismiss the appeals of all plaintiffs not named in the notice of appeal. Indeed, the result below is mandated by this Court's decision in *Torres*.**

**I. Contrary to Petitioners' assertions, the Fifth Circuit did not hold that documents other than a notice of appeal could not be considered in determining whether a notice of appeal conferred appellate jurisdiction over unnamed appellants; it merely held that the appearance of counsel form relied upon by Petitioners was insufficient to satisfy Fed. R. App. P. 3(c).**

Petitioners imply that the Fifth Circuit held "that the Rule 3(c) notice requirements could be satisfied by looking to one document, and one document alone." Petition at 5. This is incorrect. Indeed, a careful reading of the Fifth Circuit's opinion reveals that the court neither stated nor implied that it could look to only one document to satisfy the requirements of Rule 3(c).

Instead, the court, while expressly acknowledging Petitioners' argument "that Broughton plaintiffs' notice, when combined with their own Form for Appearance of Counsel, was effective to appeal the final judgment," simply held that the appearance of counsel form was insufficient to comply with Rule 3(c). *See* 893 F.2d at 803-04.

Petitioners attempt to characterize the Fifth Circuit's decision as being in accord with the Seventh Circuit's decision in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176, 1176-77 (7th Cir. 1988), which *did*

hold that the court could only consider another document if no notice of appeal was filed. Such is hardly the case. Indeed, under the Seventh Circuit's strict interpretation of Rule 3(c) and *Torres*, none of the Petitioners would have perfected an appeal, since that court has "rejected the argument that naming [an appellant] in the caption of the notice cured the omission of his name from the notice itself." *Id.* at 1176. In the instant case, only Mr. Broughton was named in the body of the notice of appeal; Mr. Barnett was only named in the caption. Clearly, had the Fifth Circuit followed *Allen Archery*, the panel below would have concluded that *none* of the Petitioners had perfected an appeal.

## II. There is no conflict among the Courts of Appeals regarding whether a court of appeals may consider more than one document to satisfy the requirements of Fed. R. App. P. 3(c).

It is also evident that the Circuits are not in conflict concerning Rule 3(c), *Torres*, or the number of documents that a court may consider to determine compliance with Rule 3(c). Indeed, all of the Courts of Appeals have dismissed appeals as to parties not named in a notice of appeal in cases presenting facts similar to those in the instant case. *See, e.g.*, D.C. Circuit: *Appeal of District of Columbia Nurses Ass'n*, 854 F.2d 1448, 1450 (D.C. Cir. 1988) (*et al.* designation insufficient to confer appellate jurisdiction over unnamed appellants), *cert. denied*, ___ U.S. ___, 109 S. Ct. 3189 (1989); First Circuit: *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 317 (1st Cir. 1989) (et al. designation insufficient to confer appellate jurisdiction over unnamed appellants even though body of notice stated

that "plaintiffs" were appealing); Second Circuit: *Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550, 552 (2d Cir. 1989) ("the notice of appeal was sufficient only with respect to the other two parties specifically named therein"); Third Circuit: *Cruz v. Melendez*, ___ F.2d ___, ___ (3d Cir. 1990) ("we conclude that this court lacks jurisdiction in this appeal over those plaintiffs designated only under the *'et al.'* label"); Sixth Circuit: *Minority Employees of the Tennessee Dept. of Employment Security, Inc. v. Tennessee*, ___ F.2d ___, ___ (6th Cir. 1990) (*en banc*) (court had appellate jurisdiction over plaintiff named in the caption of the notice of appeal but *et al.* designation insufficient to confer jurisdiction as to other unnamed plaintiffs); Seventh Circuit: *Allen Archery, Inc. v. Precision Shooting Equip., Inc.*, 857 F.2d 1176, 1176-77 (7th Cir. 1988) (court of appeals had jurisdiction only over appellant named in the body of the notice of appeal); Eighth Circuit: *Manis v. Sterling*, 862 F.2d 679, 680 (8th Cir. 1988) ("This Court has jurisdiction over only those parties specified in a timely notice of appeal."); Ninth Circuit: *Johnson v. Trustees of W. Conf. of Teamsters Pension Trust Fund*, 879 F.2d 651, 653-54 n.1 (9th Cir. 1989) ("The use of the phrase 'et al.' to identify the appellants in a notice of appeal does not comply with the specificity requirements of Fed.R.App.P. 3(c)."); Tenth Circuit: *In re Woosley*, 855 F.2d 687, 688 (10th Cir. 1988) (court lacked jurisdiction over appeal of contempt order by attorneys for party when only party was named in notice of appeal); Eleventh Circuit: *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158, 161-62 (11th Cir. 1988) (dismissing appeal as to all parties not named on the face of the notice of appeal).

Similarly, the only Courts of Appeals to consider the issue have held – as did the Fifth Circuit here – that an appearance of counsel form listing all the appellants is insufficient to satisfy the requirements of Fed. R. App. P. 3(c). For example, in *Cruz v. Melendez*, ___ F.2d ___ (3d Cir. 1990), the court rejected a similar argument as inconsistent with this Court's decision in *Torres*:

> We reject plaintiffs' argument that the appearance form filed by counsel on January 12, 1990 satisfies the requirements of Rule 3(c) because counsel named all plaintiffs individually, rather than using the "et al." designation. First, this argument is inconsistent with the Court's strict interpretation of Rule 3(c) found in *Torres*. . . .

*Id.* at ___.

The Sixth Circuit reached a similar result in an unpublished decision. In *Police Officers for Equal Rights v. City of Columbus, Ohio*, 871 F.2d 1088 (6th Cir. Mar. 24, 1989) (table, available on Westlaw No. 88-3818),[1] the court held that "[t]he inclusion of the parties on the form of appearance filed a month after the notice of appeal is insufficient to designate the parties to the appeal." Slip. op. at 1. There is no disagreement in the Courts of Appeals on this issue.

Finally, the decisions cited by Petitioners as evidencing a split in the Circuits lend no support to Petitioners' position. One case, *Nichols v. Asbestos Workers Local 24 Pension Fund*, 835 F.2d 881 (D.C. Cir. 1987), was decided

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[1] The Sixth Circuit's opinion in *Police Officers for Equal Rights v. City of Columbus, Ohio* is reproduced as Appendix I.

before *Torres*. Any pre-*Torres* inconsistency in decisions from the Courts of Appeals was presumably corrected by *Torres*.

The only other case relied upon by Petitioners as evidence of a conflict in the Courts of Appeals, *Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060 (2d Cir. 1989), hardly supports their position. Far from holding that another document provided the information omitted from the notice of appeal, the Second Circuit apparently based its decision on the fact that each plaintiff was a "representative[] of the plaintiff class," as was indicated on the plaintiffs' amended complaint. *Id.* at 1061 n.1. In reaching this conclusion, the court relied upon the Fifth Circuit's decision in *King v. Otasco, Inc.*, 861 F.2d 438, 442-43 (5th Cir. 1988), which held that the appeal of children was properly before the court despite the omission of their names from the notice of appeal because the father, who was named in the notice of appeal, had sued on their behalf as their representative.

In short, *Al-Jundi* and *King* simply hold that a Court of Appeals has jurisdiction over an appeal by represented parties when only the representative party is named in the notice of appeal. This has no relevance to the instant case – which was not a class action – and does not indicate a division in the Courts of Appeals over whether a court may consider more than one document to determine if the requirements of Rule 3(c) are satisfied.

## III. Any alleged inconsistency in Fifth Circuit decisions should be corrected by that court sitting *en banc*.

As a final reason for this Court to grant their petition for writ of certiorari, Petitioners assert that the decisions

*within* the Fifth Circuit are in conflict concerning whether that Court of Appeals will consider documents other than the notice of appeal to determine compliance with Rule 3(c). This basis for this Court reviewing this case lacks even arguable merit.

First, the two cases that Petitioners allege are in conflict with the decision below were decided prior to *Torres*. *See Page v. DeLaune*, 837 F.2d 233 (5th Cir. 1988) (decided February 12, 1988); *Van Wyk El Paso Inv., Inc. v. Dollar-Rent-a-Car Sys., Inc.*, 719 F.2d 806 (5th Cir. 1983) (decided November 14, 1983). Petitioners' argument overlooks the fact that *Torres* resolved a conflict in the Circuits over the application of Rule 3(c) and cited the Fifth Circuit's decision in *Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1177 (5th Cir. 1986), as representative of a Court of Appeals decision holding that an appeal by a party not named in a notice of appeal is permitted in limited instances. *Torres*, 487 U.S. at 314 & n.1. Of course, this Court's decision in *Torres* rejected the approach taken by the Fifth Circuit in favor of a strict interpretation of Rule 3(c). Assuming that Petitioners' assertions concerning inconsistent decisions from the Fifth Circuit are correct, any "inconsistent" pre-*Torres* decisions from the Fifth Circuit are of questionable value insofar as such decisions construe Rule 3(c) more liberally than *Torres*.

Furthermore, it is clear that the Fifth Circuit's decisions in *Page* and *Van Wyk* are consistent with the Fifth Circuit's decision in this case. In *Van Wyk*, the Fifth Circuit rejected the virtually identical arguments made by Petitioners here and held that an appearance of counsel form was insufficient to meet the requirements of Rule 3(c). 719 F.2d at 808. In *Page*, the Fifth Circuit held that a

letter designating the record on appeal, which letter contained "all the information required by Rule 3(c)," was sufficient to satisfy the requirements of Rule 3(c). 837 F.2d at 237. Furthermore, in *Page*, the court expressly noted and reaffirmed *Van Wyk's* holding that an appearance of counsel form was insufficient to satisfy the requirements of Rule 3(c). *Id.*

In the instant case, the Fifth Circuit expressly considered *Van Wyk* and *Page* and concluded that, under those decisions, Petitioners' appearance of counsel form was not sufficient to comply with Rule 3(c). 893 F.2d at 804. Hence, the decisions of the Fifth Circuit have been completely consistent in holding that an appearance of counsel form is not an effective substitute for a notice of appeal.

Finally, assuming that there is some inconsistency in the decisions from the Fifth Circuit concerning the minimum requirements that a document or documents must meet to satisfy Rule 3(c), it is clear that any internal inconsistency could best be addressed by the Fifth Circuit sitting *en banc*. Indeed, Fed. R. App. P. 35(a) expressly states that *en banc* review is appropriate "when consideration by the full court is necessary to secure or maintain uniformity of its decisions. . . ." Petitioners chose not to seek *en banc* review in the Fifth Circuit to correct the alleged inconsistency in the Fifth Circuit decisions. This Court should not grant Petitioners application for writ of certiorari when Petitioners bypassed the appropriate remedy of *en banc* rehearing.

## IV. The decision below is mandated by the plain language of Rule 3(c) and this Court's decision in *Torres v. Oakland Scavenger Co.*

Even were this Court to grant the petition for writ of certiorari, it is clear that *Torres* would dictate affirmance of the Fifth Circuit's decision. It is undisputed that the notice of appeal filed by Petitioners was premature and that no subsequent notice of appeal was filed. It is also undisputed that the Broughton plaintiffs' notice of appeal, upon which Petitioners rely, named only "Robert H. Broughton, et al." in the body of the notice of appeal. It is also undisputed that the caption of the Broughton plaintiffs' notice of appeal was styled "Troy D. Barnett, et al."

Application of the principles in *Torres* to these essentially undisputed facts makes it clear that the Fifth Circuit had jurisdiction over *at most* the appeal of Robert H. Broughton, who was named in the body of the notice of appeal and Troy D. Barnett, who was named in the caption. Indeed, if the Fifth Circuit erred at all, it was by concluding that the Broughton plaintiffs' notice of appeal was effective to confer appellate jurisdiction over an appeal by Mr. Barnett, since the body of the Broughton plaintiffs' notice of appeal clearly indicates that only Mr. Broughton was appealing.

Finally, Petitioners paraphrase the Fifth Circuit's observation that "[h]arshness may sometimes be inescapable, but no one would suggest that we employ it as a guiding principle." *King v. Otasco, Inc.*, 861 F.2d 438, 443 (5th Cir. 1988); Petitioners' argument was perhaps best answered last month by the *en banc* Sixth Circuit, which

explained the importance of adherence to procedural rules as follows:

> Rather plainly, certain rules are deemed sufficiently critical in avoiding inconsistency, vagueness and an unnecessary multiplication of litigation to warrant strict obedience even though application of the rules may have harsh results in certain circumstances. Under *Torres*, Rule 3(c) is such a rule.

*Minority Employees of the Tennessee Dept. of Employment Security, Inc. v. Tennessee*, ___ F.2d ___, ___ (6th Cir.) (*en banc*).

## CONCLUSION

The decision below is wholly consistent with this Court's interpretation of Fed. R. App. P. 3(c) in *Torres v. Oakland Scavenger Co.* and with the overwhelming majority of decisions from the other Courts of Appeals. Furthermore, the Fifth Circuit did not hold, as Petitioners suggest, that it was precluded from considering documents other than a notice of appeal in determining whether the requirements of Rule 3(c) were satisfied. Instead, the court merely concluded that the appearance of counsel form relied upon by Petitioners was insufficient to satisfy Rule 3(c)'s requirements. This decision is consistent with the only other Courts of Appeals to address the issue.

The decision below correctly applied this Court's decision in *Torres*. There is no conflict in the Courts of Appeals with respect to any issue raised by Petitioners. No sound basis exists for this Court to review this case.

Petitioners' petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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## APPENDIX A

**Final Judgment entered on December 30, 1988, in *Troy D. Barnett, et al. v. Petro-Tex Chemical Company, et al.*, No. 85-1296 (S.D. Tex. Dec. 27, 1988).**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| TROY D. BARNETT, et al.,<br>Plaintiffs,<br>vs.<br>PETRO-TEX CHEMICAL CORPORATION, et al.,<br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION<br>NO. H-85-1296 |

FINAL JUDGMENT

(Filed Dec. 30, 1988)

The plaintiffs take nothing from Petro-Tex Corporation and Tenneco.

Signed on December 27, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

## APPENDIX B

**The Broughton plaintiffs' motion for reconsideration filed January 9, 1989.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| TROY D. BARNETT, ET AL., Plaintiffs, VS. PETRO-TEX CHEMICAL CORPORATION and TENNECO, INC., Defendants. | § § § § § § § § § § | CIVIL ACTION NO. H-85-1296 (Consolidated with Civil Action No. H-85-2461) |

THE BROUGHTON PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE BROUGHTON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

The Plaintiffs in Civil Action No. H-85-2461 (hereinafter "Broughton Plaintiffs") file this Motion for Reconsideration of The Broughton Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Summary Judgment ("Motion"), and would respectfully show the Court as follows:

1. On March 13, 1987, the Broughton Plaintiffs filed their Motion for Summary Judgment. On or about March 31, 1987, the Defendants filed their Motion for Summary Judgment.

2. On December 27, 1988, the Court signed a Memorandum on Summary Judgment ("Memorandum") and Final Judgment ("Judgment") ordering that the Plaintiffs take nothing from Petro-Tex Chemical Corporation and Tenneco, Inc. The Judgment was entered on December 30, 1988.

3. Substantial reasons exist for the Court to reconsider the Motions for Summary Judgment filed by the Broughton Plaintiffs and the Defendants and set aside its Judgment. The summary judgment evidence demonstrates that there are genuine issues as to material facts in the case.

4. First, a genuine issue of material fact exists as to whether the Broughton Plaintiffs were terminated from their employment with Petro-Tex. In the Memorandum, the Court states, "The principal issue determining Petro-Tex's breach of contract is whether the sale of Petro-Tex to Texas Petro Chemical was a termination of Petro-Tex employees." Memorandum at p. 6. Additionally, the Court states, "Termination means to discontinue the employment of a worker, not a mere change in corporate ownership." Memorandum at p. 7. The sale of Petro-Tex was not a mere change in corporate ownerships, however, but a sale of substantially all of the assets of Petro-Tex. Upon the sale of substantially all of its assets, Petro-Tex did not terminate its corporate existence. Petro-Tex did and still does exist as a separate corporate entity. Further, whether the Broughton Plaintiffs suffered losses and benefits substantial enough to constitute termination is a fact issue to be decided by the jury.

5. Second, a genuine issue of material fact exists as to whether Petro-Tex operated under a de facto severance benefit program. The evidence demonstrates in part, as follows:

(1) The original Separation Payments Plan was amended to include early retirees. *See* the Broughton Plaintiffs' Exhibit 4, Qualifying Terminations (1).

(2) Salary employees taking early retirement were eligible for severance pay. Defendants' Responses to Plaintiffs' First Request for Admissions No. 9.

(3) The Defendants routinely gave severance pay to early retirees of Petro-Tex. *See* Defendants' Responses to Plaintiffs' First Interrogatories No. 2 and letter from Defendants' counsel dated August 29, 1986, with attached memo by Clifton Cobb dated August 21, 1986.

(4) The schedule from the Separation Payments Plan was used in every instance. *See* Defendants' Responses to Plaintiffs' First Interrogatories No. 2.

(5) Petro-Tex referred to a policy of severance pay in written memoranda to its employees after 1981. *See* Broughton Plaintiffs' Exhibit 17; Exhibit 8 to Deposition of Plaintiff Broughton attached hereto as Exhibit "A"; and Broughton Plaintiffs' Exhibit 10 at p. 3.

(6) The Defendants believed a severance benefit program was in effect after 1981 and sought to escape any liability for severance pay by attempting to force the purchaser, as a condition of hiring any employees, to obtain statements from them that no "severance" of their employment had occurred. *See* The Broughton Plaintiffs' Exhibit 19 at p. 41.

(7) In connection with and as a result of the sale, all of the Broughton Plaintiffs took early retirement. The Broughton Plaintiffs' Statement of Facts and Law at p. 5; *see* the Broughton Plaintiffs' Exhibits 29 and 32.

(8) Of the twenty salaried employees of Petro-Tex who received severance pay because of the sale, thirteen took early retirement at the same time. The Broughton Plaintiffs Motion for Summary Judgment at p. 13.

(9) Employees of Petro-Tex received severance pay after the purported termination of the Separation Payments Plan. *See e.g.*, Deposition of Plaintiff Broughton at pp. 38-40 attached hereto as Exhibit "A"; Deposition of Plaintiff Hradecky at pp. 30-31 attached hereto as Exhibit "B"; Deposition of Bowers at pp. 23-25, 35-39 attached hereto as Exhibit "C"; and Broughton Plaintiffs' Exhibit 10 at p. 3.

6. Third, a genuine issue of material fact exists as to whether the Broughton Plaintiffs Dickson and Somers were contractually vested in the Separation Payments Plan at the time of the alleged termination of the Separation Payments Plan. At the time of the alleged termination of the Separation Payments Plan, those two Broughton Plaintiffs were eligible to take early retirement. In their pleadings, the Broughton Plaintiffs assert that the Defendants are estopped from terminating the Separation Payments Plan, therefore, as to Broughton Plaintiffs Dickson and Somers who were contractually vested in the Plan. *See* The Broughton Plaintiffs Motion for Summary Judgment at p. 12. The Defendants have not, by affidavit or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure, set forth specific facts showing that there is a genuine issue relating to this

matter. The Broughton Plaintiffs are entitled to summary judgment on this issue. Assuming *arguendo* that the Defendants' general pleadings constitute summary judgment evidence sufficient to respond to the Broughton Plaintiffs' pleadings, the Defendants have, at best, raised a genuine issue of material fact as to this matter.

7. Fourth, a genuine issue of material fact exists as to whether The Broughton Plaintiffs received adequate notice of termination of the Separation Payments Plan. While it is true that Plaintiff Zeringue received a copy of the termination notice, other Broughton Plaintiffs testified that they did not see the notice, nor did they know of the purported termination of the Plan until the litigation began. *See* The Broughton Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at p. 9; the Broughton Plaintiffs' Exhibits 25, 27 and 29; Depositions of Plaintiff Broughton at p. 38 attached hereto as Exhibit "A", Plaintiff Johnson at pp. 19-20 attached hereto as Exhibit "D"; Plaintiff Hradecky at pp. 29-30 attached hereto as Exhibit "B".

8. Finally, a genuine issue of material fact exists as to whether the Defendants administered the severance pay plan used in connection with the sale in accordance with its terms as stated in Broughton Plaintiffs Exhibit 21. Some Broughton Plaintiffs did not receive a job with equivalent responsibilities. *See* The Broughton Plaintiffs' Motion for Summary Judgment at pp. 14-15; Deposition of Plaintiff Musil at p. 9 attached hereto as Exhibit "E"; Deposition of Plaintiff Dickson at p. 14 attached hereto as Exhibit "F"; Deposition of Plaintiff Zeringue at p. 6 attached hereto as Exhibit "G"; Deposition of Plaintiff Broughton at p. 16 attached hereto as Exhibit "A". None

of the Broughton Plaintiffs received an offer of an equivalent job because their employee benefits were substantially reduced. *See* The Broughton Plaintiffs' Motion for Summary Judgment at pp. 15-16; Broughton Plaintiffs' Exhibit 21; Defendants' Response to Plaintiffs' First Request for Admissions Nos. 59-64. The question of what constitutes an "equivalent job" for purposes of administering the severance pay plan used in connection with the sale is a genuine issue of material fact.

WHEREFORE, The Broughton Plaintiffs pray that the Court (i) reconsider the Motions for Summary Judgment filed by the Broughton Plaintiffs and the Defendants; (ii) deny Defendants summary judgment against the Broughton Plaintiffs; and (iii) grant such other and further relief to which the Broughton Plaintiffs may be justly entitled.

Respectfully submitted,

By: /s/ John A. Irvine * with permission by LPH

John A. Irvine
I.D. No. 0905

Five Post Oak Park,
Fourth Floor
Houston, Texas 77027
(713) 961-5300

*ATTORNEY-IN-CHARGE FOR THE BROUGHTON PLAINTIFFS*

OF COUNSEL:

Linda P. Henry
I.D. 5468
Boyar, Norton & Blair
Five Post Oak Park, Fourth Floor
Houston, Texas 77027
(713) 961-5300

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of The Broughton Plaintiffs' Motion for Reconsideration of the Broughton Plaintiffs' Motion for Summary judgment and Defendants' Motion for Summary Judgment has been forwarded to Richard R. Brann, Baker & Botts, One Shell Plaza, Suite 3000, Houston, Texas 77002 and David M. Feldman, Vison & Elkins, 2908 First City Tower, 1001 Fannin, Houston, Texas 77002-6760, by certified mail, return receipt requested on this 9th day of January 1989.

/s/ Linda P. Henry
Linda P. Henry

## APPENDIX C

**The Barnett plaintiffs' notice of appeal filed January 25, 1989.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| TROY D. BARNETT, ET AL.<br><br>Plaintiffs,<br><br>v.<br><br>PETRO-TEX CHEMICAL CORPORATION & TENNECO, INC.<br><br>Defendants | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. H-85-1296 (Consolidated with Civil Action No. H-85-2461) |

NOTICE OF APPEAL
(Filed Jan. 25, 1989)

Notice is hereby given that Troy D. Barnett, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30, 1988, and from the Order denying Plaintiffs' Motion to Remand entered in this action on December 22, 1986.

Respectfully submitted,

/s/ David M. Feldman
DAVID M. FELDMAN
So. Dist. No. 2294
2908 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2260

*Attorneys for Troy D. Barnett, et al.*

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 1988, a true and correct copy of the foregoing Barnett Plaintiffs' Response to Defendants' Third Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment has been served on all counsel by placing same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Mr. Richard R. Brann
3000 One Shell Plaza
Houston, Texas 77002

Mr. John A. Irvine
Porter & Clements
3500 Republicbank Center
Houston, Texas 77002

/s/ David M. Feldman
*Attorney for Barnett Plaintiffs*

## APPENDIX D

**January 30, 1989, order denying the Broughton plaintiffs' motion for reconsideration.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| TROY D. BARNETT, et al.<br>Plaintiffs,<br>v.<br>PETRO-TEX CHEMICAL CORPORATION, et al.,<br>Defendants | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION<br>NO. H-85-1296 |

ORDER

(Filed Jan. 30, 1989)

The Broughton plaintiffs' motion for reconsideration is denied.

Signed on January 25, 1989, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

## APPENDIX E

**The Broughton plaintiffs' notice of appeal filed February 24, 1989.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| TROY D. BARNETT, et al., | § | |
| Plaintiffs, | § | |
| | § | C.A. No. |
| v. | § | H-85-1296 |
| | § | (Consolidated |
| PETRO-TEX CHEMICAL | § | With |
| CORPORATION and | § | C.A. No. |
| TENNECO, INC. | § | H-85-2461) |
| Defendants. | § | |

NOTICE OF APPEAL

(Filed Febr. 24, 1989)

Notice is hereby given that Robert H. Broughton, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30, 1988 and from the Order denying Plaintiffs' Motion for Reconsideration entered in this action on January 30, 1989.

Respectfully submitted,

BOYAR, NORTON & BLAIR

By: /s/ JOHN A. IRVINE
JOHN A. IRVINE
I.D. No. 0509
Five Post Oak Park
Fourth Floor
Houston, Texas 77027
(713) 961-5300

ATTORNEYS FOR ROBERT H. BROUGHTON, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal has been forwarded to attorneys of record via certified mail, return receipt requested, on this 24 day of February, 1989:

Richard R. Brann
Baker & Botts
One Shell Plaza
Suite 3000
Houston, Texas 77002

David M. Feldman
Vinson & Elkins
2908 First City Tower
1001 Fannin
Houston, Texas 77002-6760

/s/ John A. Irvine
John A. Irvine

## APPENDIX F

**Fifth Circuit's order that the motion to dismiss would be carried with the case.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 89-2146

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(Filed Sept. 5, 1989)

TROY D. BARNETT, ET AL.,
Plaintiffs-Appellants,
versus
PETRO-TEX CHEMICAL CORPORATION, ET AL.,
Defendants-Appellees.

**********

ROBERT H. BROUGHTON, ET AL.,
Plaintiffs-Appellants,
versus
PETRO-TEX CHEMICAL CORPORATION, ET AL.,
Defendants-Appellees.

---

**Appeals from the United States District Court for the Southern District of Texas**

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Before GEE, JOLLY and DUHE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motion to dismiss appeal for want of appellant jurisdiction is carried with the case.

ORDER

(2)

IT IS FURTHER ORDERED that appellees' motion to dismiss appeal as to all appellants not named in notices of appeal is carried with the case.

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## APPENDIX G

**The opinion of the Fifth Circuit in *Troy D. Barnett, et al. v. Petro-Tex Chemical Corporation, et al.*, 893 F.2d 800 (5th Cir. 1990).**

**Troy D. BARNETT, et al.,**
**Plaintiffs-Appellants,**

**v.**

**PETRO-TEX CHEMICAL CORPORATION, et al.,**
**Defendants-Appellees.**

**Robert H. BROUGHTON, et al.,**
**Plaintiffs-Appellants,**

**v.**

**PETRO-TEX CHEMICAL CORPORATION, et al.,**
**Defendants-Appellees.**

**No. 89-2146.**

United States Court of Appeals,
Fifth Circuit.

Feb. 8, 1990.

---

Appeals from the United States District Court for the Southern District of Texas.

LIVELY,* JOLLY and DUHE,
Circuit Judges.

LIVELY, Circuit Judge.

This is an appeal from summary judgment for the defendants in a consolidated action seeking damages for

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* Circuit Judge of the Sixth Circuit, sitting by designation.

claimed violations of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (1982) (ERISA) and pendent state law claims.

I.

A.

In 1984, Tenneco, Inc. sold the assets of its wholly-owned subsidiary, Petro-Tex Chemical Corp., to an unrelated entity, Texas Petrochemicals, Inc. Some Petro-Tex employees accepted immediate employment with Texas Petrochemicals while others exercised an available option and took early retirement around the time of the sale. Members of both groups eventually filed suits against Petro-Tex and Tenneco, claiming breach of contract and ERISA violations.

Forty-seven former Petro-Tex employees who accepted employment with Texas Petrochemicals (Barnett plaintiffs) filed a complaint in a Texas district court. They charged that the sale resulted in their involuntary termination and that none of them received the notice of termination required by their employment contracts. Although these plaintiffs accepted employment with Texas Petrochemicals, they complained that they were not given the same jobs or salaries that they had with Petro-Tex. In addition, the Texas Petrochemicals benefit package was worth less than the one they had at Petro-Tex.

Eleven of the employees who accepted early retirement (Broughton plaintiffs) filed a complaint in the United States District Court for the Southern District of Texas. They claimed that Petro-Tex and Tenneco denied them

severance benefits in violation of an employer's duties under ERISA, and breached their contract of employment.

The defendants removed the Barnett plaintiffs' case to the United States District Court for the Southern District of Texas where it was consolidated with the Broughton plaintiffs' case on motion of the defendants and over the objections of the plaintiffs. The district court denied the Barnett plaintiffs' motion to remand their action to the state court. Pursuant to a local rule the consolidated action proceeded as "Troy D. Barnett, et al. v. Petro-Tex Chemical Corp., et al." Counsel for each group of plaintiffs continued to press that group's claims separately.

B.

The district court granted summary judgment in favor of the defendants on all claims. The final judgment dismissing the consolidated action was signed by the district judge on December 27, 1988, and entered by the clerk on December 30, 1988. On January 9, 1989, the Broughton plaintiffs filed a motion for reconsideration. On January 25, 1989, the Barnett plaintiffs filed a notice of appeal, as follows:

> Troy D. Barnett, Et Al., Plaintiffs,
>
> v.
>
> Petro-Tex Chemicals Corp. & Tenneco, Inc., Defendants.

NOTICE OF APPEAL

> Notice is hereby given that Troy D. Barnett, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30, 1988. . . .

This notice was signed by an attorney who had represented the Barnett plaintiffs throughout the district court proceedings.

On January 25, 1989, the district judge signed an order denying the Broughton plaintiffs' motion for reconsideration. This order was entered January 30, 1989. On February 24, 1989, the Broughton plaintiffs filed a notice of appeal as follows:

> Troy D. Barnett, et al., Plaintiffs,
>
> v.
>
> Petro-Tex Chemical Corporation and Tenneco, Inc. Defendants.

NOTICE OF APPEAL

> Notice is hereby given that Robert H. Broughton, et al., Plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on December 30, 1988 and from the Order denying Plaintiffs' Motion for Reconsideration entered in this action on January 30, 1989.

This notice was signed by the attorney who had represented the Broughton plaintiffs throughout the district court proceedings.

C.

The defendants filed a motion to dismiss the Barnett plaintiffs' appeal as untimely and the Broughton plaintiffs' appeal as to all plaintiffs except Robert H. Broughton. The motion was referred to the hearing panel. The defendants argue that the Barnett plaintiffs' notice of appeal was premature, since the Broughton plaintiffs' motion for reconsideration was pending at the time this notice of appeal was filed. The Barnett plaintiffs did not file a new notice of appeal within 30 days after the entry of the order disposing of the motion for reconsideration. While conceding that the notice of appeal filed by the attorney for the Broughton plaintiffs was timely, the defendants contend that the notice was effective only to appeal the judgment against Robert H. Broughton, the only appellant named in the notice.

The Barnett plaintiffs respond that they filed a "Form of Appearance of Counsel" on February 27, 1989, which listed the name of each Barnett plaintiff seeking to appeal the final judgment. They argue that this document, filed within 30 days after entry of the order denying the Broughton plaintiffs' motion for reconsideration, advised the court that all the Barnett plaintiffs were appealing. They argue, further, that since the district court entered only one final judgment in the consolidated cases, only one notice of appeal was required. The Broughton plaintiffs' timely appeal stated that the "Plaintiffs abovenamed" appealed, and the caption showed Troy D. Barnett, et al. as plaintiffs. Thus, they contend that the Broughton plaintiffs' notice, when combined with their own Form for Appearance of Counsel, was effective to

appeal the final judgment on behalf of all the Barnett plaintiffs.

In the alternative, the Barnett plaintiffs maintain that the Broughton plaintiffs' motion for reconsideration did not affect the time for a notice of appeal by the Barnett plaintiffs. Therefore, they argue, their January 25, 1989, notice of appeal was not premature and they were not required to file a new notice of appeal.

The Broughton plaintiffs argue that their notice of appeal should be amended to add the names of all the Broughton plaintiffs as appellants. They argue, in the alternative, that the case should be remanded to the district court for clarification of the final judgment. They contend that the judgment is ambiguous since the district court merely wrote that "[t]he plaintiffs take nothing" without designating to which of the 58 plaintiffs the judgment applied.

All issues related to the notices of appeal have been fully briefed by the parties.

II.

The defendants' motion to dismiss raises questions under two different rules of appellate procedure. Federal Rule of Appellate Procedure 3(c) states, "The notice of appeal shall specify the party or parties taking the appeal. . . ." Rule 4(a)(4) provides that if a timely motion is filed in the district court by any party under Rule 59 of the Federal Rules of Civil Procedure to alter or amend a judgment, the time for all parties to appeal runs from entry of the order granting or denying the motion. The

Rule continues: "A notice of appeal filed before the disposition of [the motion] shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

A.

We examine the Barnett plaintiffs' notice of appeal first. The motion for reconsideration is treated as a civil procedure Rule 59(e) motion to alter or amend the judgment, thus bringing appellate Rule 4(a)(4) into play. *Benson v. Bearb*, 807 F.2d 1228 (5th Cir.1987). That rule provides that a motion filed "by any party" causes the time for appeal "for all parties" to run from entry of the order, and renders a notice of appeal filed before disposition of the motion of "no effect." Thus, the pendency of the Broughton plaintiffs' motion rendered the Barnett plaintiffs' January 25, 1989, notice of appeal a nullity.

The Barnett plaintiffs' argument that the Form for Appearance of Counsel, which listed all the plaintiffs represented by the filing attorney, should be treated as a timely notice of appeal cannot be sustained. In *Van Wyk El Paso Investment, Inc. v. Dollar Rent-A-Car-Systems*, 719 F.2d 806 (5th Cir.1983), this court rejected the same argument now made by the Barnett plaintiffs. In *Van Wyk*, Rule 4(a)(4) rendered a premature notice of appeal ineffective, and the would-be appellant relied on several documents which it filed within 30 days of entry of final judgment as providing constructive notice of appeal. One of the documents relied upon was a Form for Appearance of Counsel. Refusing to treat the documents relied upon

as the equivalent of a notice of appeal, this court characterized such documents as "no more than steps in the perfection of the prematurely noticed appeal." *Id.* at 807. *Briggs v. Procunier,* 764 F.2d 368 (5th Cir.1985), does not hold to the contrary. In *Briggs,* the notice of appeal was ineffective, but the plaintiff "rescued his appeal," by filing a motion to clarify the record. *Id.* at 370. This motion, unlike the documents in *Van Wyk,* contained all of the information required of a notice of appeal by Rule 3(c). *Id.* at 370-71.

*Page v. DeLaune,* 837 F.2d 233 (5th Cir. 1988), likewise provides no support for the Barnett plaintiffs' argument. The *Page* court held that several documents, considered together, were sufficient to satisfy Rule 3. It noted the limits to its decision, however, and stated specifically that a Form for Appearance of Counsel plus three communications from court clerks would not suffice. *Id.* at 237.

The Broughton plaintiffs' motion for reconsideration controlled the time for filing a notice of appeal by all the parties to the action, including the Barnett plaintiffs. Because the Barnett plaintiffs did not follow their ineffective notice with a new timely notice of appeal, as required by Rule 4(a)(4), this court has no jurisdiction over their attempted appeal. *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982); *Harcon Barge Co., Inc. v. D. & G. Boat Rentals, Inc.,* 746 F.2d 278, 280-81 (5th Cir. 1984), *cert. denied,* 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

B.

The Broughton plaintiffs' notice of appeal contained the caption assigned by the district court to the

consolidated case and designated "Robert H. Broughton, et al., Plaintiffs above-named" as the appealing parties. Rule 3(c) requires that the notice of appeal "specify the party or parties taking the appeal. . . ." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), the Court held that the use of "et al." in a notice of appeal "utterly fails to provide" notice to the court and opposing party of the identity of the appellant or appellants. *Id.* 108 S.Ct. at 2409. Thus the statement that Robert H. Broughton, et al., appealed the final judgment brought only the appeal of Broughton himself before the court of appeals. The court lacks jurisdiction over any intended appeal by the other Broughton plaintiffs. Strict compliance with Rule 3(c) is a jurisdictional requirement. *Id; Smith v. White*, 857 F.2d 1042, 1043 (5th Cir.1988).

This court has held in a case decided since *Torres* that the specification of one plaintiff, followed by "et al.," was sufficient to effect an appeal by the only other plaintiff in the case. *Pope v. Mississippi Real Estate Commission*, 872 F.2d 127 (5th Cir.1989). The court distinguished *Torres* "in the limited context of this two party action." *Id.* at 129. It was clear that "et al." could refer only to the other plaintiff. In the context of a two party action, the use of "et al." does not leave the court "unable to determine with certitude whether a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Torres*, 108 S.Ct. at 2409. The unnamed plaintiffs' in the present case can find no comfort in *Pope*. The unnamed plaintiffs in Barnett number 46, and in Broughton they number 10.

C.

Barnett also raises the question whether the Broughton plaintiffs' timely notice of appeal brought the individual appeal of Troy D. Barnett before this court. As Barnett asserts, when cases have been consolidated in district court and disposed of by entry of one final judgment, a single notice of appeal may be used by all the appealing parties. That notice of appeal must, however, satisfy the jurisdictional requirements of Rule 3(c) by providing "notice both to the opposition and to the court of the identity of the appellant or appellants." *Torres*, 108 S.Ct. at 2409.

The Broughton plaintiffs' notice of appeal bore the caption. "Troy D. Barnett, et al., Plaintiffs," and stated that "Robert H. Broughton, et al., Plaintiffs above-named" appealed from the final judgment. The only "Plaintiffs above-named" were Troy D. Barnett, et al. The use of "et al." was not effective to notify the court and the defendants that any unnamed person was appealing. We believe, however, that the caption and the quoted reference to above-named plaintiffs, read together, gave sufficient notice of the identity of the appellants – Robert H. Broughton and Troy D. Barnett.

It is of no consequence that the attorney who filed the Broughton notice of appeal did not represent Barnett and probably did not intend to include him in the appeal. Our decision must turn on whether the notice of appeal complies with Rule 3(c), not on the intent of the drafter of the notice. This is made clear by the opinion in *Torres*. The *Torres* notice of appeal was intended to include Jose Torres as an appellant. The Court found, however, that

"[i]t is undisputed that the omission [of Torres' name] in the notice of appeal was due to a clerical error on the part of a secretary employed by petitioner's attorney." 108 S.Ct. at 2407. If a party who intended to appeal may be shut out by a clerical error, surely a party who also intended to appeal must be included when someone files a form referring to "Plaintiffs above-named" and that person is the only party named above.

Our discussion of *Torres* makes clear that the Broughton plaintiffs' notice of appeal is effective to perfect an appeal by Robert H. Broughton only among the Broughton plaintiffs. The addition of "et al." does not confer jurisdiction on this court over attempted appeals by any of his co-plaintiffs in his original suit. The Broughton plaintiffs assert that their notice of appeal should be amended to include all of the names of those plaintiffs. *Torres* does not permit this. The Supreme Court stated, "Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." 108 S.Ct. at 2408. Courts of appeal have no power to extend the time for filing a notice of appeal.

The Broughton plaintiffs also argue that this court should remand the case to the district court for clarification of its "ambiguous" judgment. We find no ambiguity in the judgment. The district court adjudged that "[t]he plaintiffs take nothing." The district court consolidated the two cases and directed that they proceed as a "unified case." The reference to "the plaintiffs" clearly included all plaintiffs in both of the original actions.

This court has jurisdiction over the appeals of the individual plaintiffs, Troy D. Barnett and Robert H. Broughton, but has no jurisdiction over attempted appeals by any other plaintiffs in the two actions who were not named in Robert Broughton's timely notice of appeal.

III.

The principal remaining issue on appeal is whether the district court properly denied summary judgment in favor of the plaintiffs and properly granted the defendants' motion for summary judgment. The district court held that ERISA does not apply, and that the plaintiffs' right to severance pay is controlled by the provisions of their individual contracts of employment. The plaintiffs do not contest the ERISA ruling, and we are concerned with the summary judgment rulings only as they apply to the contract claims.

A.

We do not find Barnett's contract in the record. A copy of Broughton's contract was filed with his complaint, and the parties have indicated that the operative provisions are the same. Broughton's contract dealt principally with the protection of trade secrets, contained a limited non-competition clause, and required disclosure to the employer of inventions, discoveries and improvements in which the employee was involved. The final paragraph of the agreement stated:

> Parties hereto agree that except by written mutual consent, the employment covered by this Agreement shall not terminate until either

> party hereto shall have given the other party at least ninety (90) days prior written notice of the intention to terminate said employment; provided, however, Petro-Tex reserves the right to terminate such employment at any time prior to the expiration of said ninety (90) day period by the payment of the entire salary which might be due and payable Employee for and during the said ninety (90) day notice period.

The defendants did not give the required notice prior to the sale of Petro-Tex to Texas Petrochemicals. Both plaintiffs sued for payment of salary in lieu of the prescribed notice, as provided for in the quoted language. The defendants maintain, as they did in the district court, that neither employee was terminated within the meaning of the agreement. They argue that there was no termination because the sale did not interrupt the plaintiffs' employment. Both immediately went to work at the same plant for the new owner. Although the new jobs were not identical, the work and pay were substantially the same. Broughton, however, apparently retired shortly after the sale upon determining that his benefits with Texas Petrochemicals would be less than as a Tenneco early retiree.

The plaintiffs argue that they were terminated when their employment relationship with Petro-Tex was brought to an end by the sale of the employer's assets to Texas Petrochemicals. They contend that it is immaterial that they were hired immediately by Texas Petrochemicals and suffered no period of unemployment. The agreement spoke only of a termination by Petro-Tex, and the right to notice or salary was not contingent upon the decision of the purchaser whether to offer them employment. They also assert that the defendants stipulated that

there was a termination and that the district court ignored the stipulation in ruling on the cross-motions for summary judgment.

Barnett also argues that the district court abused its discretion in consolidating the cases and in denying his motion for a remand to the state court. Broughton likewise contends that the district court abused its discretion in consolidating the cases.

B.

The district court filed a memorandum with its summary judgment order. The memorandum disposed of the breach of contract claims as follows:

> The principal issue determining Petro-Tex's breach of contract is whether the sale of Petro-Tex to Texas Petrochemical was a termination of Petro-Tex employees. Termination means to discontinue the employment of a worker, not a mere change in corporate ownership. Upon the sale, Texas Petrochemicals, the new owner, provided immediate jobs to the former employees. Admitting that some of the employees obtained different responsibility and compensation, the former employees' jobs were not terminated by the sale of Petro-Tex.
>
> Contracting for pay in lieu of a notice of termination is intended to help an individual facing an unexpected period of unemployment to ease the financial burdens while looking for a new job. The employees are not entitled to termination pay because the employees were not terminated.
>
> Although the salary is substantially the same, the employees claim that they have lost

up to forty percent of their compensation from Petro-Tex, direct and indirect. At some point, a decrease in total compensation would amount to a constructive termination but not in this case. A forty percent decrease admittedly is significant but it is not substantial enough to require the payment of termination pay.

IV.

A.

The plaintiffs contend that the district court erred by not granting them summary judgment on the basis of the defendants' stipulation that they were terminated. An examination of the record discloses no stipulation by the defendants that the plaintiffs were terminated within the meaning of the notice provision of the contract. The defendants consistently took the position that the notice provision was not applicable to former Petro-Tex employees who were offered comparable employment by Texas Petrochemicals. During the deposition of H.R. Bowers, an attorney for the defendants stated, "We will stipulate that the employment relationship with Petro-Tex was terminated." This was nothing more than an agreement to stipulate to an indisputable fact. It was not a stipulation that the plaintiffs were terminated in the legal sense that the contract required for triggering the right to notice or salary in lieu of notice. Thus, the district court properly denied the plaintiffs' motions for summary judgment.

B.

The district court erred, however, in granting the defendants' motion for summary judgment. A court may

grant summary judgment only if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The district court held that the provision in the individual agreements for pay in lieu of a notice of termination "is intended to help an individual facing an unexpected period of unemployment to ease the financial burdens while looking for a new job." Assuming this intention, the district court held that the employees were not terminated within the meaning of agreements. Nothing in the agreements requires either conclusion. The agreements do not define the words "terminate" and "termination," and contain no statement of the reason for including the termination provision.

Courts that have considered the question are badly split over whether a period of unemployment is required for an employee to be eligible for severance of termination pay.

1.

In *Younger v. Thomas International Corp.*, 275 Ark. 327, 629 S.W.2d 294 (1982), the Supreme Court of Arkansas affirmed a trial court's rejection of a claim for pay in lieu of notice by employees of a plant that was sold. All employees continued to work at the same or similar jobs, earning at least the salary they were receiving prior to the sale. The employees eventually received a benefits package that equalled the one they enjoyed before the sale. In affirming the trial court, the Supreme Court relied heavily on a statement of purpose in the agreement:

> The purpose of termination allowance is to provide financial assistance for a short period of time to allow for readjustment for salaried employees who are terminated through no fault of their own.

*Id.* 629 S.W.2d at 296. There is no such statement of purpose in the individual agreements in the present case. Furthermore, the employer's severance policy in *Younger* stated that termination would not be paid when an employee was offered an equivalent job opportunity. We find no such policy statement in the present record.

The defendants also rely upon *Linz v. Champion International Corp.*, 208 Mont. 99, 675 P.2d 979 (1984). They fail to note, however, that the *Linz* court specifically rejected the trial court's reliance on the fact that the plaintiff was offered comparable employment as the basis of denying severance payments. Instead, the court looked to a definition of "terminate" in prior Montana decisions. Applying this definition, it held that Linz was not entitled to benefits. Also as in *Younger*, the decision in *Linz* was reached after a full trial, not on summary judgment.

Applying South Carolina law, the court denied benefits to former employees in *Livernois v. Warner-Lambert Co., Inc.*, 723 F.2d 1148 (4th Cir.1983). The court emphasized that each case dealing with severance benefits upon termination must be considered on its own facts, since "the variation of language spelling out the particular circumstances in which a right to severance pay will arise approach[es] the infinite. . . ." *Id.* at 1151. The court based its decision primarily on the fact that the plaintiffs' employment with purchaser was substantially the same in all material respects as before the sale. In reaching its

conclusion, the court found it necessary "first . . . to discard as inapplicable cases where the nature of employment by the successor company, in terms of salary and other benefits, is markedly different and less favorable, from the employees' point of view, than that in force when the predecessor was the employer. . . ." *Id.* at 1152. In the present case the plaintiffs claimed a forty percent decrease in total compensation, and the district court correctly assumed this claim to be true for purposes of summary judgment. Without further analysis, however, the district court treated this significant decrease as immaterial.

The defendants also seek to uphold the district court's decision by citing federal decisions denying severance benefits to employees hired by a successor. *E.g. Acton v. Tosco Corp.*, 815 F.2d 1161 (8th Cir.1986); *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir.1985), *aff'd without opinion sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901, 106 S.Ct. 3267, 91 L.Ed.2d 559 (1986); *Sly v. P.R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir.1983). Although the courts in these and similar cases upheld the denial of severance benefits, they did so in the context of reviewing the decisions of plan administrators under benefit plans subject to ERISA. When these and similar decisions were rendered, such determinations by administrators were conclusive unless found to be arbitrary or capricious. The Supreme Court has held that this is the wrong standard of review – that a denial of ERISA benefits is to be reviewed under a de novo standard unless a plan gives the administrator certain discretionary authority. *Firestone Tire & Rubber Co. v. Brunch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989). Although

the courts that affirmed denial benefits under the arbitrary or capricious standard indicated, in some cases, that they agreed with the determination that an employee who is offered comparable employment by a purchaser is not entitled to severance benefits, the denials were not subjected to an independent legal analysis. Another ERISA case, applying the arbitrary or capricious standard, has upheld a decision awarding severance benefits even though the employees suffered no period of unemployment because the purchaser retained them in their previous jobs. See *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir.1987). We are not persuaded that these ERISA decisions form a basis for affirming summary judgment in this case.

2.

In *Gerson v. Diamond Shamrock Corp.*, 710 S.W.2d 368 (Mo.App.1986), the court held that employees who immediately went to work for a purchaser were entitled to severance benefits when the division for which they worked was sold. The original employer's policy provided benefits "[w]here separation from employment is . . . because of a permanent layoff due to lack of work. . . ." The court held that "[s]ale of the division ended their connection with [the] employer; there was no further work for them with [the] employer." *Id.* at 369. The court found nothing in the controlling language that "distinguishes the case where they are offered employment with the new owner from the case where they are not offered such employment." *Id.*

In *Chapin v. Fairchild Camera and Instrument Corp.*, 31 Cal.App.3d 192, 107 Cal. Rptr. 111 (1973), the employer's policy provided for severance pay that was "intended to cover the readjustment period required by the employee to obtain another position." *Id.* 107 Cal.Rptr. at 113. When the division for which the plaintiffs worked was sold, the purchaser offered comparable employment with full seniority rights and substantially equal fringe benefits. The termination allowances provided by the purchaser were not equal to those of the original employer. Shortly after the sale the purchaser began terminating employees. The purchaser paid some of the terminated employees the smaller benefits provided by its policy.

The California Court of Appeals held that the employees were entitled to receive from their original employer the full amount of severance pay provided by its policy. The court concluded that the sale was a layoff due to lack of work within the meaning of the original employer's policy. Having sold the division, the employer had no work to offer the employees of the sold division. The fact that the plaintiffs were employed immediately by the purchaser was immaterial. Citing *Adams v. Jersey Central Power & Light Co.*, 36 N.J.Super. 53, 114 A.2d 776 (1955), the *Chapin* court stated:

> [U]nemployment is not a prerequisite to the right to separation pay which may, and frequently does, exist where there is no interruption whatever in the continuity of employment. Separation pay is not analogous to, nor is it a form of, unemployment compensation. Rather, it is a kind of accumulated compensation for past services and a material recognition of their past value. . . . It concerns the past, not the future,

> and once it is earned, it becomes payable no matter what may thereafter happen.

107 Cal.Rptr. at 115-16.

We have not attempted to identify or discuss all the cases dealing with the issue of severance benefits where an employer sells the assets of a company or division and the purchaser offers immediate employment to the seller's former employees. We have discussed a sufficient number of decisions to indicate that each case is controlled by the language of a policy or agreement and that it is not universally accepted that a period of unemployment is a prerequisite for entitlement to termination pay.

C.

In a diversity case applying Texas law, this court has defined "termination of employment" when used in a group insurance policy as "the complete severance of the relationship of employer and employee. . . ." *Bliss v. Equitable Life Assurance Society of the United States*, 620 F.2d 65, 69 (5th Cir.1980) (citation omitted). Literally applied, this definition could lead to the conclusion that Barnett and Broughton were terminated. It is not clear, however, that this definition applies in the context of an employment agreement. There are genuine issues of material fact concerning whether the complete severance of employment relationships resulted in termination and whether the reduced benefits offered by Texas Petrochemicals required a finding that the employees were terminated even though they were offered immediate employment by the purchaser.

We find no support in this record for the district court's conclusion that the plaintiffs, as a matter of law, were not terminated within the meaning of their individual agreements. The district court cited no authority for its conclusion and referred to no record basis for its determination of the intent or purpose of the agreements. Unless the terms of a contract are clear, questions of interpretation are questions of fact. *Carpenters Amended & Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763, 766 (5th Cir.1985). At least two factual issues precluded the entry of summary judgment in favor of the defendants: (1) the intent of the parties in providing for notice and payment of salary in lieu of notice, and (2) the meaning of "terminate" as used in the individual agreements.

V.

An examination of the record convinces us that the district court did not abuse its broad discretion either in consolidating the two cases, which arose out of the same event, or in denying the Barnett plaintiffs' motion for remand.

The judgment of the district court is REVERSED and the case is REMANDED for proceedings consistent with this opinion.

## APPENDIX H

**Fifth Circuit Order denying panel rehearing dated March 3, 1990**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 89-2146

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TROY D. BARNETT, ET AL.,

Plaintiffs-Appellants,

versus

PETRO-TEX CHEMICAL CORPORATION, ET AL.,

Defendants-Appellees.

* * * *

ROBERT H. BROUGHTON, ET AL.,

Plaintiffs-Appellants,

versus

PETRO-TEX CHEMICAL CORPORATION, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Southern District of Texas

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ON PETITION FOR REHEARING
(Filed March 3, 1990)

Before LIVELY*, JOLLY and DUHE, Circuit Judges.

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* Circuit Judge of the Sixth Circuit, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

## APPENDIX I

**Unpublished decision of the Sixth Circuit in *Police Officers for Equal Rights v. City of Columbus, Ohio*, 871 F.2d 1088 (6th Cir. Mar 24, 1989).**

No. 88-3818

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | |
|---|---|
| Police Officers for Equal Rights, *et al.*,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>City of Columbus, Ohio; Tom Moody; Bernard Chupka; Earl Burden; Thelma Schoonover; John Young; Earl Sherard, Jr.; Dale Crawford,<br><br>Defendants-Appellees, | ORDER<br><br>(Filed Mar. 24, 1989) |

Before: KRUPANSKY and NELSON, Circuit Judges; and BROWN, Senior Circuit Judge.

This is a purported appeal from a purported denial of a purported motion for a new trial. Defendants move for dismissal on the grounds that the notice of appeal does not specify the persons taking the appeal. Plaintiffs have not responded directly to the motion, but did file a reply brief after the motion had been made.

Fed. R. App. P. 3(c) provides that "[t]he notice of appeal shall specify the party or parties taking the appeal . . . ." The caption of the notice of appeal in the instant case identifies the plaintiffs as "Police Officers for Equal Rights, et al." The body of the notice states that "the plaintiff" gives notice of appeal. In this context, the use of

"et al." in the caption is insufficient to provide notice of the parties to the appeal. *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988); *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989). The inclusion of the parties on the form of appearance filed a month after the notice of appeal is insufficient to designate the parties to the appeal. *See Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176 (7th Cir. 1988) (per curiam). Counsel for the Police Officers for Equal Rights has indicated by motion before this court that it is not pursuing an appeal. Under these circumstances, the notice of appeal is totally defective.

It is ORDERED that the motion to dismiss the appeal is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, jy
Clerk

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 89-1761

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TROY D. BARNETT, ET AL.

*Petitioners,*

v.

PETRO-TEX CHEMICAL CORPORATION

and TENNECO, INC.,

*Respondents.*

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# PETITIONERS' REPLY BRIEF

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*Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988) ..... 1, 2

## REPLY ARGUMENT

Respondents' Brief in Opposition misdirects this Court's attention from the crucial issue in this case. Petitioners have not and do not claim that the use of the term "et al." in a notice of appeal can constitute effective notice of "the party or parties taking the appeal," as required by Rule 3(c), Fed. R. App. P. Indeed, as Petitioners acknowledged in their Petition for Writ of Certiorari on page 6, that issue has been conclusively eliminated by *Torres v. Oakland Scavenger Co.*, ___ U.S. ___, 108 S. Ct. 2405 (1988). Nor do Petitioners contend that a form for appearance of counsel, standing alone, can be an adequate substitute for a notice of appeal. Instead, the issue is whether a timely filed form for appearance of counsel (or, for that matter, any timely filed document) can be considered *in conjunction with* a timely filed notice of appeal in determining whether the requirements of Rule 3(c) have been met. Stated another way, is there anything in the rules that directs the court to ignore the fact that a subsequent document, also timely filed, contains all the essential, missing information necessary to identify "the party or parties taking the appeal"?

In *Torres*, this Court instructed that the requirements of Rule 3(c) are met "if the litigant's action is the functional equivalent of what the rule requires." 108 S. Ct. at 2049. Surely, the filing of a notice of appeal whose only defect is its failure to identify all of the appellants included in the designation "et al.," followed by the filing of Petitioners' form for appearance of counsel, which references the judgment appealed from and specifically defines the term "et al." and identifies each of the parties bringing the appeal, is "the functional equivalent of what the rule requires." Any other interpretation would be contrary to both the spirit and the letter of the federal rules.

This is not a situation where the form for appearance of counsel, standing alone, is defective as a notice of appeal, a distinction that has escaped Respondents. In contrast to the cases cited in Respondents' Brief in Opposition, Petitioners are not asking this Court to consider the form *in lieu of* a notice of appeal, but *in addition* to such notice. Nor is this a case where the Court is precluded from considering a document which might have sufficed to meet the requirements of Rule 3(c), but was filed out of time. Here, both documents Petitioners are asking the Court to consider were filed within the 30 day period designated by Rule 4(a)(4), Fed. R. App. P., for noticing an appeal.

Taking all these factors into consideration, there is simply no basis for the Fifth Circuit's decision to disregard a document filed on time that clears up any ambiguity concerning the identity of the parties in the prior filed notice of appeal. Nothing in the rules nor this Court's decisions can be interpreted to dictate that result. If all a court can consider is a single piece of paper, then this Court should instruct litigants to disregard the language in *Torres* that permits compliance in any other manner and simply advise parties that the narrow, rigid reading of Rule 3(c) employed by the Fifth Circuit and the Seventh Circuit will henceforth be the test for determining the validity of a notice of appeal. *See Allen Archery, Inc. v. Precision Shooting Equip.*, 857 F.2d 1176 (7th Cir. 1988). Otherwise, courts will continue to issue inconsistent rulings, as evidenced by the recent cases from the Second Circuit and the D.C. Circuit regarding the parameters of Rule 3(c) and what constitutes effective notice. *See Al-Jundi v. Estate of Rockefeller*, 885 F.2d 160 (2d Cir. 1989); *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881 (D.C. Cir. 1987).

The latest opinion from the Fifth Circuit, a case decided since Petitioners' Petition for Writ of Certiorari was filed, only

adds to the confusion of this area of the law.[1] In *Birdsong v. Wrotenbery*, 901 F.2d 1270, appellants attempted to convert a "Stipulation to Include Omissions from the Record" and a "Motion to Supply Omissions in the Record" into a timely filed notice of appeal. In contrast to the decision in this case, however, in *Birdsong*, the Fifth Circuit indicated its willingness to consider other timely filed appeal papers in determining whether the specific requirements of Rule 3(c) had been met. The court concluded, "[t]hese two documents taken individually or *coupled together* fail to satisfy any one of the three elements required under Rule 3(c)." *Id.* at _____. In *Birdsong*, not only was the "et al." designation of the parties left unexplained, but neither document referenced the judgment or order from which the appeal was taken. The court concluded that the failure to satisfy the simple requirements of Rule 3(c) led to the demise of the appeal. And yet, the clear implication of the Fifth Circuit's opinion in *Birdsong* is that had the documents contained all the essential information required for noticing an appeal, the court could have viewed this as substantial compliance with the technical requirements of Rule 3(c) and the "functional equivalent" of a notice of appeal. It cannot be overemphasized that the two appeal papers in the instant case, taken together, *did* contain all the essential information required by the rule and were timely filed.

Respondents' brief cites a number of new cases; however, none of these cases address the one issue facing this Court. Instead, the cases cited by Respondent, without exception, deal with issues that have no bearing on the fact situation

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1/ Petitioners are mindful of Respondents' argument regarding their failure to move for rehearing *en banc* before the Fifth Circuit. As Respondents are no doubt aware, however, the Fifth Circuit, by express policy, strongly disfavors suggestions for rehearing *en banc* and cautions counsel against its use.

or question raised in this case. This is best demonstrated by the parenthetical descriptions used by Respondent to explain the holding in each case. *See* Respondents' Brief in Opposition at 8-9. Without repeating these references, suffice it to say that all of Respondents' cases deal with the insufficiency of the "et al." designation and the jurisdictional bar to considering any document not filed within the time required by the rules.

Although there is no discussion of these cases, Respondents do include a quotation from one case, *Cruz v. Melendez*, 902 F.2d 232 (3d Cir. 1990), for the proposition that another circuit has rejected Petitioners' argument that a form for appearance of counsel can be considered along with a notice of appeal:

> We reject plaintiffs' argument that the appearance form filed by counsel on January 12, 1990 satisfies the requirements of Rule 3(c) because counsel named all plaintiffs individually, rather than using the "et al." designation. First, this argument is inconsistent with the court's strict interpretation of Rule 3(c) found in *Torres* ... .

*Cruz*, 902 F.2d at _____; Respondents' Brief at 10. Respondents' quotation, however, ends too soon. Indeed, in the very next sentence of that opinion, the court specifically states that the form for appearance of counsel cannot be considered *because it "was filed after the 30 day time limit* for a notice of appeal"[2] *Id.* This is

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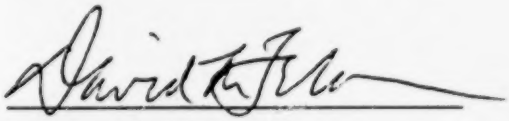
2/ Likewise, the simple fact that the form for appearance of counsel was filed outside the 30 day deadline was also the reason for its rejection in the Sixth Circuit case cited by Respondent and included in the appendix to its brief. *Police Officers for Equal Rights v. City of Columbus, Ohio*, 871 F.2d 1088 (6th cir. 1989). By referring to this case, Petitioners are not condoning Respondents' use of an unpublished opinion as authority, a practice clearly prohibited by the rules.

obviously a crucial distinction.

For the foregoing reasons and those previously set forth, Petitioners respectfully ask this Court to grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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